

United States
7
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.
(IN FOUR VOLUMES.)

DAVID TAYLOR,

Appellant,

vs.

NEVADA HUMBOLDT TUNGSTEN MINES COMPANY,
a Corporation, TUNGSTEN PRODUCTS COMPANY,
a Corporation, MILL CITY DEVELOPMENT COM-
PANY, a Corporation, W. J. LORING, C. W. POOLE,
R. NENZEL, H. J. MURRISH, L. A. FRIEDMAN,
C. H. JONES, G. K. HINCH, J. T. GOODIN, V. A.
TWIGG, J. C. HUNTINGTON and LENA J. FRIED-
MAN, Individually,

Appellees.

VOLUME II.
(Pages 353 to 768, Inclusive.)

Upon Appeal from the United States District Court for the
District of Nevada.

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(Testimony of David Taylor.)

Q. State what took place at that time, Mr. Taylor?

A. I telegraphed Mr. Loring, asking to meet him for general discussion of the tungsten situation, and with the understanding that there was a combination of all the tungsten producers in this country whom he represented, and I wanted to secure the sales agency of that product; I understood that Mr. Loring was the man to talk to; [269—265] I telegraphed him, and made an engagement to meet him in New York, took breakfast with him, and discussed various matters; I told him that we had not made an agreement with these people; I think I went into the matter in detail, I am not sure as to just what detail; I told him that we had a claim against these people, and unless we—

Mr. COOKE.—(Intg.) As to any conversation between this witness and Mr. Loring, we object to it on the part of the defendants other than Mr. Loring, on the ground it is hearsay, incompetent, irrelevant and immaterial what discussion they may have had, and not binding upon us.

Mr. THATCHER.—Not binding on anybody but Mr. Loring; we don't contend it is binding on anybody but Mr. Loring.

Mr. WHEELER.—I suppose it is addressed to the question of notice to Mr. Loring?

Mr. THATCHER.—The question of notice, yes.

Q. Did you finish the conversation?

A. No. I told Mr. Loring at that time—just

(Testimony of David Taylor.)

into how much detail I went I don't know—I gave him the general substance of our negotiations and interviews in San Francisco; told him the matter was not settled, that we had hoped to get it settled, that we still had hopes; that Mr. Thane was negotiating at that time, or Mr. Bayless was, and asked him if he had any interest in the matter then; he said he did not at that time; I told him that the probabilities were, if we didn't make a settlement with them, that we would file some sort of a suit, just what I didn't know.

Q. Was that all the conversation?

A. That was in substance all.

Q. That is the substance of the conversation, not the exact words? A. Yes.

Q. Did you ever send Mr. Loring a telegram?

A. I did.

Q. Some time in August, 1919?

A. I think it was, yes. [270—266]

Q. Will you produce that telegram, Mr. Davis, please?

(The telegram is handed to counsel for plaintiff.)

Mr. THATCHER.—We offer this in evidence.

Mr. WHEELER.—No objection.

Mr. THATCHER.—(Q.) This is the telegram you sent, is it? A. Yes.

(The telegram from David Taylor to W. J. Loring, dated Aug. 10, 1919, is admitted in evidence, and marked Plaintiff's Exhibit No. 28.)

Q. You received an answer to that telegram, from Mr. Loring? A. Yes.

(Testimony of David Taylor.)

Mr. THATCHER.—We offer this in evidence.

Mr. WHEELER.—No objection.

(Telegram from W. J. Loring to David Taylor, is admitted in evidence, and marked Plaintiff's Exhibit No. 29.)

Mr. THATCHER.—(Q.) Mr. Taylor, has Mr. Thane any interest in this controversy at the present time? A. He has not.

Q. Or in the property? A. He had not.

Q. Has he released his interest? A. He has.

Q. I call your attention to this statement, do you know Mr. Thane's signature? A. Yes.

Q. Is that his signature signed there to the release? A. It is.

Q. What is the date of that?

A. September 11, 1920.

Q. Had you had any word or letter from Mr. Thane previous to that time, stating that he was out?

A. I had a letter from Mr. Bayless, written on behalf of Mr. Thane.

Q. Didn't you have any letter from Mr. Thane?

A. No, no direct letter from Mr. Thane.

Mr. THATCHER.—You want this to go in, do you, Mr. Wheeler?

Mr. WHEELER.—Yes, I want it to go in. We don't admit that Mr. Thane is out of it, and you offer that document to prove that he is out of the transaction.

Mr. COOKE.—In behalf of defendants other than Mr. Loring, we object to the admission in

(Testimony of David Taylor.)

evidence of the paper offered, upon the ground that it affirmatively appears from the evidence that Mr. Thane [271—267] had an interest in the subject-matter of the contract, and was not made a party with the plaintiff Taylor; and this so-called assignment of date September 11, 1920, is after the commencement of the suit, and not a release existing at the time the suit was commenced.

The COURT.—That is the 11th day of September, this year?

Mr. THATCHER.—Yes, your Honor; I am going to supplement that with a letter.

The COURT.—Very well, the paper will be admitted for what it is worth.

(The release, dated September 11, 1920, is marked Plaintiff's Exhibit 30.)

Mr. THATCHER.—I think that is all, if the Court please.

Recross-examination.

Mr. WHEELER.—(Q.) Did you pay to Mr. Thane any money consideration for executing to you on the 11th day of September, 1920, the document just offered in evidence, whereby he purports to release to you any claims or matters involved in this suit? A. No, sir.

Q. In order that your Honor may be mindful of the course of the examination, I will read this aloud to you: (Reads Plaintiff's Exhibit No. 28.) "Reno, Nevada, August 10, 1919. W. J. Loring, Crocker Building, San Francisco. Reno newspaper reports dispatch from Imlay stating you

(Testimony of David Taylor.)

have bought Friedman tungsten interests in Mill City district. Would appreciate your wiring early Monday as to what if any Nevada Humboldt interests you have bought. The companies and stockholders owe me considerable money and my attorneys consider I have good case for compelling present stockholders assign to me control of stock of both companies or as alternative heavy damages. My actions will largely depend on what if any interests you may have as I don't want involve you in this mess. Wire care George Thatcher, Reno. David Taylor." And the answer [272—268] thereto; (Reads Plaintiff's Exhibit No. 29:) "San Francisco, Calif., August 11, 1919. David Taylor, Care Geo. Thatcher, Reno, Nev. I hold option on Nevada Humboldt interests. W. J. Loring." I call your attention to the portion of the telegram, Plaintiff's Exhibit 28, wherein you say "The companies and stockholders owe me considerable money and my attorneys consider I have good case for compelling present stockholders assign to me control of stock of both companies or as alternative heavy damages." Did you ever prior to the institution of the present suit, institute a suit for damages for breach of the contract Exhibit "C"?

Mr. THATCHER.—Objected to as not cross-examination.

Mr. WHEELER.—He claims this is notice.

The COURT.—I will sustain the objection. I do not see, Mr. Wheeler, where that suit comes in as

(Testimony of David Taylor.)

part of the notice; he is simply offering this to show notice.

(Discussion.)

The COURT.—I shall adhere to the ruling.

Mr. WHEELER.—(Q.) Did you on the 9th day of August, 1919, make oath to a complaint in damages. I show you a document purporting to be a complaint filed in this court, being number 2263, and ask you if the signature to the verification thereto attached is your signature?

Mr. THATCHER.—Objected to as not cross-examination.

Mr. WHEELER.—Merely preliminary, your Honor.

The COURT.—Oh, I will let him answer that, but when it comes to introducing that document.

Mr. WHEELER.—Your Honor understands I am making a record on this matter.

WITNESS.—Yes, that is my signature.

Mr. WHEELER.—(Q.) You signed that document on the 9th day of August, 1919?

A. I should say I did, yes.

Q. I call your attention to the fact that the telegram addressed [273—269] by you to W. J. Loring is dated the 10th day of August; had you already signed the document just exhibited to you, the verification of August 9th, prior to sending the telegram, Exhibit 28?

Mr. THATCHER.—Object to it as not cross-examination.

(Testimony of David Taylor.)

The COURT.—I will sustain the objection on the ground it is not cross-examination.

Mr. WHEELER.—As a part of the cross-examination of the witness we offer in evidence the bill of complaint at law in action number 2263 in this court.

The COURT.—It will be the same ruling.

Mr. WHEELER.—(Q.) Did you ever send any other or different written notice of any kind or character to Mr. Loring than the one just identified?

A. I wrote him a letter three or four days afterwards, maybe a week after, when I returned to Denver.

Q. Have you a copy of the letter?

A. I think so, yes; there is one in the files.

Mr. WHEELER.—The letter I am speaking of is at the hotel. I notice it is 12 o'clock.

(At 12:00 o'clock a recess is taken until 1:30 P. M.)

AFTER RECESS—1:30 P. M.

Examination of Mr. DAVID TAYLOR Resumed.

Mr. THATCHER.—I would like to ask the witness some questions on redirect, if the Court please.

Q. Mr. Taylor, is that a copy of the letter which you sent to Mr. Loring? A. Yes.

Mr. THATCHER.—We offer it in evidence.

(Letter dated August 10, 1919, from David Taylor to W. J. Loring is marked Plaintiff's Exhibit No. 31.)

(Testimony of David Taylor.)

Q. Mr. Taylor, you testified yesterday that you had written some [274—270] letters to the Crucible and other people with reference to this property? A. Yes, sir.

Q. And you testified in response to a question of Mr. Wheeler's as to whether or not you had ever used any other figures in your representations than 60,000 tons, that you had used forty-one or forty-three thousand tons? A. Yes.

Q. I call your attention to a copy, or what purports to be a copy of a letter on the letter-head of the Consolidated Ores Company, and ask you if you ever saw that before? A. I did.

Q. What is it?

A. It was written by me to the Crucible Steel Company of America.

Q. And does it concern this property, the Nevada Humboldt Tungsten Mines Company property?

A. It does.

Q. What date is it? A. April 17, 1919.

Mr. THATCHER.—We offer it in evidence.

Q. Mr. Taylor, I call your attention to another letter addressed to Roy C. McKenna, Vanadium-Alloys Steel Company, Latrobe, Pennsylvania, of the same date, April 17, 1919, and ask you if you wrote that letter? A. Yes, sir.

Q. Is that a copy of it? A. Yes, sir.

Q. Where is the original, was it mailed?

A. Yes, the original was mailed.

Q. And the same is true of the other letter, was the original of that mailed? A. Yes.

(Testimony of David Taylor.)

Q. And does that concern the Nevada Humboldt Tungsten Property? A. It does.

Mr. THATCHER.—We offer that in evidence.

Mr. WHEELER.—There will be no objection to either of these letters.

(Letters from David Taylor to Crucible Steel Co. of America, dated [275—271] April 17, 1919, is marked Plaintiff's Exhibit No. 32. The letter from David Taylor to Roy C. McKenna, Vanadium-Alloys Co., is marked Plaintiff's Exhibit No. 33.)

Mr. WHEELER.—I would like the Court to have this before it: The two letters are identical, and each contains the following statement: "The result is now an assured minimum of 43,000 tons of ore"; that is dated April 17, 1919; the point being there is no mention of 60,000 tons.

Mr. THATCHER.—The point being that he represented an assured minimum of 43,000 tons. I would like to have the privilege of calling the witness again on direct examination to identify some telegrams and letters.

Mr. WHEELER.—There will be no objection.

Mr. THATCHER.—(Q.) Mr. Taylor, I call your attention to a telegram of date January 22d, from Mr. Poole.

Mr. WHEELER.—It seems to be dated January 21st; do you offer the telegram?

Mr. THATCHER.—Yes.

Mr. WHEELER.—It is objected to as incompetent, irrelevant and immaterial; it does not seem

(Testimony of David Taylor.)

to have any bearing on the case, dated January 21, 1919.

Mr. COOKE.—We also object to it as to all other defendants except the defendant Poole, as to any evidential value.

Mr. THATCHER.—My purpose in introducing it was to show that Mr. Poole knew of the plan of development outlined in the Bancroft report.

Mr. WHEELER.—I think nobody disputes that. My understanding is, if I am wrong I trust my associates will correct me, when Mr. Bancroft was there, or rather in his report, he advised a plan of development, and that was known, that he also discussed it with Mr. Poole, and that Mr. Poole therefore knew what Mr. Bancroft's [276—272] suggestions were; and I understand that the work that went forward in the mine was pursuant to Mr. Bancroft's plan; and I think that was what Mr. Bancroft meant when he found that the development work done was satisfactory, in accordance with his plan.

Mr. THATCHER.—Do I understand you are willing to admit that as stated, Mr. Cooke?

Mr. COOKE.—Yes, sir.

Mr. THATCHER.—Well, I offer the telegram for the further purpose of showing that Mr. Poole was familiar with the mine and had knowledge of mine conditions, which is denied by the allegations.

Mr. WHEELER.—It would indicate on January 21st he knew some things set forth in the telegram,

(Testimony of David Taylor.)

but that would not tend to prove his knowledge of the mine.

The COURT.—Was not your admission that Mr. Poole understood the plan of development, and that he carried it out in the mine? It seems to me if that is the admission, it is almost an admission that he understood the mine, and was familiar with it.

Mr. COOKE.—The admission is that the work was done pursuant to the plan of development outlined by Mr. Bancroft.

The COURT.—I think I will admit this telegram.

(Telegram from C. W. Poole to David Taylor, dated January 21, 1919, is marked Plaintiff's Exhibit No. 34.)

Mr. THATCHER.—I don't want to have to offer all these to the witness, if we can agree on it.

Mr. WHEELER.—What is the purpose of the offer?

Mr. THATCHER.—The purpose of the offer is to show Mr. Poole's connection with the mine; I understand it is denied that he was in general charge of mining operations.

Mr. WHEELER.—What is the issue upon that point?

Mr. THATCHER.—My recollection is that defendants deny that.

Mr. WHEELER.—You have an allegation that certain facts were peculiarly within the knowledge of defendants, and I think that is [277—273] denied; I don't think Mr. Poole's connection with the mine is denied.

(Testimony of David Taylor.)

Mr. THATCHER.—There is also an allegation that Mr. Poole was in a general charge of the mining operations of the property.

Mr. COOKE.—We object to this; it is incompetent and immaterial, does not prove the matter stated by counsel, and it is not legal proof of it in any event; it simply purports to be a statement by H. J. Murrish in a letter to one Pettigrew; any statement of Murrish as to what Poole knew or didn't know would not be evidence as to the fact, and not proper evidence to establish the fact; that Murrish may have written it in a letter to anybody, or made a statement to anybody.

Mr. THATCHER.—So that we can save a little time, I presume counsel will admit that during all of these times Mr. Friedman was president and a director of this corporation; that Mr. Murrish was a director and vice-president; that Mr. Rudolph Nenzel was a director and secretary;—and who were the other directors?

Mr. COOKE.—Will you state them from where you are, Mr. Nenzel?

Mr. NENZEL.—I could not offhand on those dates.

Mr. COOKE.—What dates are you referring to?

Mr. THATCHER.—From January 16th to June 2d.

Mr. COOKE.—We can supply those; if we can't do it immediately, we will shortly.

Mr. THATCHER.—At any rate Murrish was vice-president and director at all of the times,

(Testimony of David Taylor.)

there is no question about that, I believe.

Mr. COOKE.—I rather think that is correct, but I don't know that it is the fact.

Mr. THATCHER.—I think Mr. Poole's connection is the only thing in which there was a change.

The COURT.—I will sustain the objection to that offer.

Mr. THATCHER—I would like to have it marked for identification. I think I will put all of these together, and have them all marked as [278—274] *as* one exhibit.

The COURT.—Are there some here that will be admitted, and others possibly not?

Mr. COOKE.—They are all subject to the same objection.

Mr. WHEELER.—Your Honor has ruled out that one of May 5th, addressed to Percy L. Pettigrew, and signed Murrish. I can see no relevancy whatever in any of the letters offered; they appear to be letters to certain defendants to the action—if counsel will point out the relevancy.

Mr. THATCHER.—My contention with reference to that, if the Court please, is that the answer denies that Mr. Poole had any knowledge of the mine itself, and the answer also denies that Mr. Poole was peculiarly informed as to the conditions in the mine. The purpose of these letters is to show that Mr. Poole did know the conditions of the mine, and, further, that the defendants recognized him as the one in charge of the mine, and in general charge of mining operations.

(Testimony of David Taylor.)

The COURT.—Do you contend those letters are competent proof of that fact?

Mr. THATCHER.—Some from Mr. Poole, some from Mr. Nenzel, and some from Mr. Friedman; in other words, that the other defendants all recognized Mr. Poole as the man in general charge.

Mr. COOKE.—We interpose the specific objection that the letters do not prove or tend to prove what counsel claims; and, secondly, that the statements between all these defendants as to what the other defendant knew or didn't know, or was doing or wasn't doing, would not be evidence in the case. Only one of these letters is signed by Mr. Poole; we don't make that objection to that particular letter, but object to it on the ground it is incompetent, and does not prove the matter that counsel refers to.

The COURT.—You may attach those all together and mark them as one exhibit; they will go into the record, but not as exhibits. I [279—275] will examine them later.

Mr. THATCHER.—I particularly would like to have the one of January 24th, for all purposes.

The COURT.—Separate that one, if you wish.

(The several letters attached are marked Plaintiff's Exhibit No. 35 for identification, and the letter dated January 24th, is marked Plaintiff's Exhibit No. 36, for identification.)

Mr. WHEELER.—Counsel, as I understand, offers the whole of each letter, and to each and every one of them, and each phrase and statement in each letter we make the objection it is incompetent, ir-

(Testimony of David Taylor.)

relevant and immaterial, self-serving, hearsay, *res alias actae*. We can see nothing in them that bears out counsel's theory. Some of these letters were written in January, a very distant date to the transactions here involved.

The COURT.—Of course if a document of that kind is rejected, it still remains part of the record.

Mr. THATCHER.—I understand your Honor will take the time to read them over.

The COURT.—If they become important, I certainly will, and if I think they are proper I will admit them.

Mr. COOKE.—There is no objection on our part to having the Court act on them later on. Your Honor can use them later on, as far as we are concerned, if you find anything in them that has any bearing.

Mr. WHEELER.—There will be no objection to the Court changing its ruling in our absence if we may have an exception. Here is a statement that Mr. Murrish hands me which shows the directors of some of these corporations.

Mr. THATCHER.—Then it may be admitted that the directors of the Nevada Humboldt Tungsten Mines Company from January 16, 1919, to July 2, 1919, were L. A. Friedman, C. H. Jones, R. Nenzel, H. J. [280—276] Murrish, and John G. Huntington. Were those the directors at all times; was Mr. Poole a director at all during that time?

Mr. MURRISH.—The dates are there.

Mr. DAVIS.—He was not a director.

(Testimony of David Taylor.)

Mr. THATCHER.—At any time?

Mr. DAVIS.—No.

Mr. COOKE.—Mr. Murrish explains that the directors of the Tungsten Humboldt Products Company were the same as the Nevada Humboldt Tungsten Mines Company, but not covering the same period; the Tungsten Products Company was not organized until in May, 1919, so that period would be from some date in May, 1919, to July 22, 1919.

Mr. WHEELER.—How about the Mill City Development Company?

Mr. THATCHER.—I will accept your statement.

Mr. WHEELER.—It is understood that the directors of the Mill City Development Company from the incorporation thereof, were W. J. Loring, C. H. Segerstrom and L. A. Friedman.

Mr. COOKE.—Is that for the same period, from January to July?

Mr. DAVIS.—That is up to August 23, 1919; and after that there was some one else in place of Mr. Friedman, C. H. Beasley, I believe.

Mr. THATCHER.—It can be admitted that the letter of August 22, 1919, addressed to the Nevada Humboldt Tungsten Mines Company, and other defendants, which appears in the form of a letter, was mailed to each of the defendants on the date of the letter by George B. Thatcher, acting as attorney and proxy for David Taylor, then a stockholder of the Nevada Humboldt Tungsten Mines Company, and I offer it in evidence.

(Testimony of David Taylor.)

(Notice dated August 22, 1919, is marked Plaintiff's Exhibit No. 37.)

Mr. COOKE.—(Q.) You stated, Mr. Thatcher, that was mailed to each of the defendants; I am not sure. While it may not be so material, I don't believe that is correct. It may have been mailed [281—277] so far as I know, but I don't think it was received by each of them.

Mr. THATCHER.—I can't say as to that. I sent it. I don't want to testify, Mr. Cooke.

Mr. WHEELER.—I desire to call your Honor's attention to the fact that there is nothing whatever in this notice suggesting that any case for specific performance of the contract was to be brought; it was merely a protest against holding a meeting on August 23d, 1919, to ratify certain contracts with Mr. Loring.

Mr. THATCHER.—That is correct. I offer in evidence a demand made upon the corporation Nevada Humboldt Tungsten Mines Company and its board of directors, or what I assume to be its board of directors, which included Mr. Poole, demanding that they commence action in the proper courts to set aside the contracts, deeds and conveyances made to Mr. Loring under the contract between the corporation and Mr. Loring, of date August 16, 1919. I merely expect to show that that was sent to the parties therein named.

Mr. WHEELER.—We make the objection that as against the defendant Loring it is incompetent, irrelevant and immaterial.

(Testimony of David Taylor.)

Mr. THATCHER.—You don't object on the ground of its not having been properly identified or testified to?

Mr. WHEELER.—No, your statement that the notice was sent is accepted by me as a fact, but I do not admit that notice should be received in evidence. You offer this as a document which you did send, and I admit you sent the document, but I object to the admission of the document in evidence upon the grounds stated.

Mr. COOKE.—In behalf of the other defendants we make the same objection; it is incompetent and irrelevant; it does not prove or tend to prove any issues in the specific performance suit, and is not responsive to any of the issues made by the pleadings in this case. [282—278]

Mr. THATCHER.—Of course we have alleged in our complaint that in addition to entering into this contract and the performance thereof, that certain contracts were executed to Mr. Loring, and we have alleged that they were executed pursuant to a meeting of stockholders held on the 16th day of August, without sufficient notice under the laws of the state of Nevada, only seven days, notice having been given, and fifteen days being required under the statute

Mr. COOKE.—So far as we are concerned, we move to strike the allegation on the same grounds stated in my objection; we have denied it, and also move to strike it—I won't say we denied it, I don't think we deny sending the notice, but we

(Testimony of David Taylor.)

have stated in our answer the allegation is frivolous.

The COURT.—Well, if it is immaterial and frivolous, I don't think it makes much difference whether it goes in or not, from your point of view, and in order to save time it may go in.

Mr. THATCHER.—We merely want to offer it for the purpose of showing we did make a demand on the managing board of the corporation to set aside the conveyances made to Mr. Loring pursuant to the meeting of the directors and stockholders held on the 16th day of August; and we offer a demand upon the stockholders of the same character and for the same purpose.

Mr. WHEELER.—I think that is denied by Mr. Loring, your Honor.

Mr. COOKE.—We make the formal objection it is incompetent, irrelevant and immaterial, does not prove or tend to prove any material issue in this specific performance suit.

Mr. THATCHER.—It is offered for the purpose of showing the demand was made and when it was made.

The COURT.—The ruling will be the same.

Mr. WHEELER.—It probably is hardly necessary to call the [283—279] Court's attention to the fact the demand in question is not a demand to set aside this contract on the ground plaintiff is entitled to 62 per cent of the stock; the demand is to set it aside because of the informality of the meeting at which it was authorized.

(Testimony of David Taylor.)

The COURT.—At the present time I don't see that the evidence is very important, but of course I can't tell just what Mr. Thatcher has in mind; so the quickest way to dispose of it is to let it in, and if it don't amount to anything, I will not have to consider it.

(Notice to the Nevada Humboldt Tungsten Mines Company and the Board of Directors is marked Plaintiff's Exhibit No. 38; and the notice to Stockholders is marked Plaintiff's Exhibit No. 39.)

Mr. THATCHER.—You may cross-examine.

Cross-examination.

Mr. WHEELER.—(Q.) You testified this morning that you told Mr. Loring in New York in substance, that you intended to bring suit, did you ever bring such a suit? A. Yes, sir.

Q. I hand you the complaint in action number 2263, the verification of which was identified by you this morning, and ask you whether or not that is the suit referred to by you?

Mr. THATCHER.—Objected to as not cross-examination.

The COURT.—It seems to me that is your case in chief.

Mr. WHEELER.—Your Honor sees it is not exactly the same proposition that was advanced this morning. The witness says in New York he is going to bring suit; he begins the suit, and I ask if this is the suit, and he says yes.

The COURT.—No, I shall sustain the objection.

Mr. WHEELER.—(Q.) This afternoon there has

(Testimony of David Taylor.)

been admitted as an exhibit in your case, Mr. Taylor, what purports to be a press copy of a letter from you to Mr. Loring; is that the letter referred to [284—280] by you this morning in your examination? A. Yes, sir.

Q. I call your attention to Plaintiff's Exhibit 31, dated Reno, Nevada, August 10, 1919; is that the letter referred to by you this morning as having been sent by you to Mr. Loring? A. Yes.

Q. Now the letter and the telegram are the only communications in writing of any kind or character that have passed between you and Mr. Loring, aren't they? A. No.

Q. I mean at any time prior to the 11th day of August? A. I think so, yes, sir.

Q. Subsequent to the 11th day of August have any passed between you?

A. I think I wrote Mr. Loring one letter returning a bill to him which was sent to Mr. Bancroft, and which Mr. Bancroft sent to me.

Q. That is all, nothing in the shape of notification of any sort? A. No, sir.

Q. So the only time you have ever called Mr. Loring's attention to your revelations with the defendants, or any or either of them; first, this conversation in New York, testified to by you this morning; second, a telegram from you to Mr. Loring offered this morning; and third, this letter dated August 10th, being Plaintiff's Exhibit 31?

A. Yes, in addition to that I went over fully with

(Testimony of David Taylor.)

Mr. Loring's managing clerk in the San Francisco office, the situation.

Q. What date are you talking about?

A. Some time the beginning of June, 1919.

Q. You had no talk with Mr. Loring? A. No.

Mr. WHEELER.—I move the answer of the witness that he went over the situation with Mr. Loring's managing clerk, be stricken out.

Mr. THATCHER.—No objection.

The COURT.—That may go out.

Mr. WHEELER.—I will read this letter to your Honor, I think it [285—281] should be in your mind: (Reads Plaintiff's Exhibit 31:) "Reno, Nevada, August 10, 1919. W. J. Loring, Esq., San Francisco, Cal. Dear Mr. Loring: You were probably surprised to receive my telegram. The telegram, however, was occasioned by an article appearing in the Reno Gazette last evening, a clipping of which I enclose herewith. I have since been informed that the article is not authentic, but in view of our talk in New York, when I had the pleasure of breakfasting with you, in all fairness, I thought it proper to advise you of the situation. I am leaving tonight for Denver and am then going to take a short fishing trip near Aspen, Colorado, and hope to get back and find tungsten \$25.00 per unit and going strong. Faithfully yours, David Taylor."

(By Mr. COOKE.)

Q. Mr. Taylor, did you ever make a proposition to the defendants in this case for a modification

(Testimony of David Taylor.)

of the April 2d contract, wherein there were any conditions with reference to prorating any money that you might pay among the creditors, other than the document that you presented to them down in San Francisco about June 7th?

A. I don't think I did, no, sir.

Q. Isn't it a fact that about the same time you presented that document to them for their action by way of modifying the April 2d contract, you were making efforts to purchase the outstanding indebtedness, or some of it?

Mr. THATCHER.—Objected to as not cross-examination.

Mr. COOKE.—Well, we think it is cross-examination with reference to the modifications and the attitude of the plaintiff as to whether he was willing to do equity or not at that time. Counsel urged that as a reason for some evidence that he asked, and it seems to me that this testimony would have a bearing upon the same feature. [286—282]

The COURT.—I will sustain the objection to that.

Mr. COOKE.—(Q.) For the purpose of the record only, I will ask you, Mr. Taylor, if it is not a fact that you did purchase one account of \$299 and some cents, from Hugh Watts of Boulder?

Mr. THATCHER.—Objected to as not cross-examination.

The COURT.—Objection sustained.

Mr. COOKE.—(Q.) Just one more question on that same line; Isn't it a fact that you endeavored to purchase the accounts of the Rochester Mining

(Testimony of David Taylor.)

Company and the Rochester Merger Mining Company against the Nevada Humboldt Tungsten Mines Company?

Mr. THATCHER.—Objected to as not cross-examination.

Mr. COOKE.—I would like to add, and that it was your intention to use those accounts that you obtained for the purpose of coercing the defendants into accepting the modified contract that you proposed?

Mr. THATCHER.—Objected to as not cross-examination.

The COURT.—Objection sustained.

Mr. COOKE.—(Q.) Mr. Taylor, along about May 20th, 1919, you were in New York City, were you not? A. Yes, sir.

Q. And Mr. Poole was also there? A. Yes, sir.

Q. And you and he met quite frequently and discussed the affairs of the mine, did you not?

A. We did meet frequently, no, we met once or twice.

Q. You met twice there and talked over matters of the mine? A. Yes.

Q. Do you recall having a conversation with Mr. Poole in New York City along about May 20th, 1919, in which the subject matter of the request of Mr. Nenzel for an advance of \$20,000 was presented to you by Mr. Poole? By Mr. Nenzel on account of the concentrates contract, an advance of \$20,000; this is simply for the purpose of calling

(Testimony of David Taylor.)

your attention to the circumstances, if I can. [287—283]

A. I don't remember, it may have been done; there were a good many such requests made.

Mr. THATCHER.—No, a conversation.

A. I don't remember, no, sir.

Mr. COOKE.—(Q.) You don't remember.

A. No, sir.

Q. Well, do you remember whether there was any such circumstances came up between you and Mr. Poole in New York City along in the month of May, 1919? A. I don't remember.

Q. You don't recall the matter at all? Do you recall having a conversation with Mr. Poole in which he told you, in substance, that Mr. Nenzel was very anxious to get an advance from you on behalf of the company of \$20,000 on your ore concentrate contract, and you replied to Mr. Poole, stating that you would not advance that until you had an examination of the property made?

A. I do not remember, no, sir.

Q. Would you say that such a conversation was not had? A. No.

Q. It might have been had?

A. I don't remember anything about any conversation in connection with advances, particularly at that time.

Q. Do you remember of telling him there that before you would make any further advances, that is, any advances on this ore concentrate contract

(Testimony of David Taylor.)

that you would have to have an examination of the mine property? A. No, sir, I do not.

Q. You would not say that you did not say that?

A. No.

The COURT.—What time was that?

Mr. COOKE.—May 20th, about May 20, 1919.

Q. Mr. Taylor, the telegram that you sent to Mr. Loring, in which you told him, in effect, that your attorneys advised you that you had a claim, or several claims, which you might urge against the Nevada Humboldt Tungsten Mines Company, that was dated August 10th, 1919, that is correct, is it, or do you recall the date—do you recall [288—284] the date of that telegram?

A. August 9th or 10th, I am not sure; I think it was August 9th or 10th I sent it the date it stated.

Mr. WHEELER.—It is in evidence. It is dated August 10th; the reply is dated August 11th.

Mr. COOKE.—(Q.) At the time when you sent that telegram, you knew as a fact that you had verified a complaint against Mr. Friedman and the other defendants, claiming something over a hundred thousand dollars damages arising out of this transaction, had you not?

Mr. THATCHER.—Objected to as not cross-examination.

Mr. COOKE.—It is preliminary to another question I want to ask.

The COURT.—Well, I will allow him to answer that categorically.

A. I could answer that in this way, sir, that the

(Testimony of David Taylor.)

dates under my signature verifying the complaint would show; I don't remember now the date at which the complaints were signed.

Mr. COOKE.—(Q.) Irrespective of the dates, don't you know at the time you sent that telegram you had verified this complaint in the damage suit against the parties I have named?

Mr. THATCHER.—Objected to as not cross-examination.

The COURT.—I will sustain the objection.

Mr. COOKE.—(Q.) Why didn't you tell Mr. Loring in that telegram that you had already taken steps to commence that suit?

Mr. THATCHER.—Objected to as not cross-examination.

The COURT.—Objection sustained.

Mr. COOKE.—(Q.) Were there any reasons in your mind, Mr. Taylor, why you should conceal or keep back the information that you had already decided to sue these people for \$140,000 damages?

Mr. THATCHER.—Objected to as not cross-examination.

The COURT.—Objection sustained.

Mr. COOKE.—(Q.) You have referred to two letters, one to the [289—285] Crucible Company and another to some Vanadium Company; did you address communications to any other company or individual other than those you have already referred to in your testimony, in which you stated the approximate tonnage in the mine there at any

(Testimony of David Taylor.)

amount less than 60,000 tons, or any other tonnage than that?

A. I may have done so, I don't remember.

Q. Well, when you say you may have done so, is it your recollection that you probably did?

A. No, sir.

Q. Do you recall at this time any letter or telegram or communication of any kind to anybody else, where you referred to the tonnage of the mine in any given amount, any given number of tons?

A. I do not, with the exception of a prospective that was prepared and submitted to a good many people.

Q. Was the tonnage given in that prospectus?

A. It was either forty-one or forty-three thousand, I don't remember.

Q. Have you that prospectus with you here, Mr. Taylor? A. I think so.

Mr. COOKE.—We would like to see it, Mr. Thatcher.

Mr. THATCHER.—Is that it, Mr. Taylor? (Hands paper to witness.) A. Yes, in part.

Q. Is there any part that don't belong to it?

A. Yes, that does not belong to it.

Mr. THATCHER.—I will take that off.

Mr. COOKE.—This prospectus does not seem to be dated.

Q. Can you tell anything about the date when it was finally prepared? A. When it was what?

Q. I say can you tell anything about the date

(Testimony of David Taylor.)

when it was finally prepared, the date or approximate date when it was prepared?

A. Its approximate date was the beginning of May, prepared by Mr. Thane or me on the way to New York. [290—286]

Q. Beginning of May, 1919? A. Yes.

Mr. WHEELER.—(Q.) You did the work on the train, didn't you, as you went along? A. Yes.

Mr. COOKE.—(Q.) Was this report prepared in full from the date you compiled together there on the train? A. Will you repeat that question?

Q. Was this report made up from the data you had with you on the train there at the time?

A. Yes, part of it was made up from data Mr. Thane had.

Q. Where was it finally typewritten and reduced to its final form?

A. The final copy was typewritten by the stenographer on the train; whether that is the particular copy that was typewritten, I am not sure; there were a number of copies made.

Q. How many copies, approximately, did you have made of this prospectus?

A. I guess ten or twelve, I don't know.

Q. And were any of the other copies used with parties that you thought you might interest in this venture?

A. Yes, sir, that was used as a basis of my attempt to raise money in New York.

(Testimony of David Taylor.)

(By Mr. WHEELER.)

Q. The page that was on here as first presented, was what?

Mr. THATCHER.—Objected to as not cross-examination.

Mr. WHEELER.—(Q.) Had it no relation to this, was it not a part of this?

A. No, sir, it was not part of the prospectus.

Q. Was it a document prepared by Mr. Thane and yourself on the trip? A. Was it what?

(The reporter reads the question.)

A. I don't believe so, I don't know when it was prepared.

Q. It seemed to have been incorporated with this; are you positive that it was not a part of it?

A. I am positive that it was not presented to people as the prospectus. [291—287]

Q. I understand, but wasn't it part of the prospectus prepared by you and Mr. Thane on the trip, whether subsequently presented to people or not? A. I do not remember, sir.

Q. Look at it again, please, and see. (Hands paper to witness.)

Mr. THATCHER.—You can have it if you really want it.

Mr. WHEELER.—If it is part of it I want it; if it is evidence, I want it. I am trying to find out whether or not we have the full document that was prepared on the train.

Mr. THATCHER.—He testified to that, and that is why I took it off.

(Testimony of David Taylor.)

(The paper is handed to counsel for defendants by Mr. Thatcher.)

Mr. WHEELER.—(Q.) Examine the document which I now show you, "Proposed capitalization," and state whether or not that document, or its basis, was prepared by Mr. Thane and yourself on the train on the way to New York?

A. I could not tell you, sir.

Q. What is your best recollection of it, a document that comes from your possession?

A. My best recollection would be that this document shows on its face that Mr. Brown has subscribed for ten thousand; Mr. Brown did not definitely subscribe for ten thousand until after I returned to Denver, therefore I should say this was prepared after I returned to Denver; the general outline was prepared on the train. That is the only possible way I can tell you it was prepared.

Mr. WHEELER.—We offer the two documents.

(The paper headed "Memorandum No. 3," is marked Defendant's Exhibit "U," and the paper headed "Proposed Capitalization" is marked Defendant's Exhibit "V.")

Mr. WHEELER.—I call your Honor's attention to the following portion of Exhibit "U:" (Reads) [292—288] "Examination: Property examined July 1918 by F. L. Hyder, now Assistant in Bureau of Mines at Washington, for B. L. Thane; and January 17—27, 1919, by Howland Bancroft, Mining Geologist of Denver, for David Taylor;

(Testimony of David Taylor.)

both making favorable reports. Geology and character of disposition of ore such that there is reasonable assurance of continuation of ore in depth to bed of enclosing granite basin, estimated between 1000 and 1500 feet, or 600 to 1100 feet deeper than bottom of present shaft; and, latterly, for full length of outcrops, in proportion, as milling grade now appears on surface.

“At date of Hyder’s examination, practically no ore fully developed. Mill under construction, operations being confirmed to immediate mining and shipping. At date Bancroft examination, mill operating full capacity and development progressed so that 8,111 tons of 1.75% ore in sight. Bancroft advised program of development, to be finished July 1st, 1919, which from indicated ore, he estimated should fully develop 157,000 tons by that date. This program now being diligently carried out. On April 1, new survey of this work indicated ore reserve of 41,000 tons, or an increase of 32,000 tons since January 27, with bottom of shaft and all faces of drifts showing good values.”

And I call attention to Defendant’s Exhibit “V,” headed “Proposed Capitalization.” Both may be considered read.

Q. Mr. Taylor, when a certain telegram was presented to you here upon the stand, in which you stated that your father’s subscription was \$20,000, you said it was a typographical error; when a certain letter was presented to you on the stand, say-

(Testimony of David Taylor.)

ing that your father's subscription was \$20,000, you said it was a typographical error.

Mr. THATCHER.—No, he didn't say typographical error.

Mr. COOKE.—No, he said it was an error.

Mr. THATCHER.—And he explained the situation later. [293—289]

Mr. WHEELER.—(Q.) I now hand you Defendants' Exhibit "V," and call your attention to the following: "Present Lineup Stock Ownership F. M. Taylor 20,000, D. R. C. Brown, 10,000, B. L. Thane 25,000, David Taylor, 95,000—150,000," F. M. Taylor, 20,000, was that also an error?

A. Mr. Taylor's subscription was 25,000; how the question of 20,000 came up I could not tell you at this time, I don't remember.

Mr. WHEELER.—That is all.

By Mr. COOKE.—(Q.) On the last page of this paper marked Exhibit "U" is the following in parenthesis: "For confirmation data see accompanying reports"; what reports does that refer to as accompanying this paper?

A. I showed Mr. Bancroft's report with that, properly explaining the map and plates, showing how the mine was to be developed, and how and where the 157,000 tons was to come from, and the developments up to that time as given me by Mr. Poole in Denver.

Q. And the term "accompanying reports" was intended to refer to the Bancroft report only, and nothing else?

(Testimony of David Taylor.)

A. As far as I know, yes, sir; I may possibly have had some statement, no other mining report.

Q. Whose writing is that in lead pencil there?

A. Mine.

Q. "See attached memo." is that what that reads—excuse me for not being able to read it more readily? A. Yes.

Q. What attached memo. does that refer to; where is the memo that was attached?

A. I don't know; I should say that referred to that other paper that was attached there.

Q. This one here showing the proposed capitalization?

A. Yes, it states "Attached memo." was put in there, and showed with the preferred stock would be a bonus of common stock, something like that.
[294—290]

Mr. COOK.—I think that is all.

Mr. THATCHER.—Are you through with the examination for the present?

Mr. COOKE.—Yes, that is all.

(A short recess is taken at this time.)

Redirect Examination.

Mr. THATCHER.—(Q.) Mr. Taylor, I call your attention to Exhibit "U," that is the prospectus which was made up by you and Mr. Thane on the train? A. Yes.

Q. I call your attention also to exhibit 32, in which you state that there is an assured minimum

(Testimony of David Taylor.)

of 43,000 tons; why did you in that letter use the tonnage of 43,000 tons?

Mr. COOKE.—We object.

Mr. WHEELER.—Objected to as incompetent, irrelevant and immaterial, and not redirect examination.

Mr. THATCHER.—I want to show why he made those representations in that form.

The COURT.—I will allow the question. To what issue does that go, Mr. Thatcher?

Mr. THATCHER.—Merely the question that he relied upon the representations, and made them in turn to others, representations which had been made to him.

Mr. WHEELER.—The issue in the complaint is that the representation was 60,000 tons.

Mr. THATCHER.—That is true, and this is not inconsistent with it at all, an assured minimum of 43,000 tons.

Mr. COOKE.—In the light of counsel's statement, we specially object that the evidence is incompetent.

Mr. THATCHER.—That is their contention; I want to show why he used the words 43,000 tons [295—291]

The COURT.—I will allow you to ask the question.

Mr. THATCHER.—(Q.) Why did you use the words in the letter to the Crucible Steel Company, Plaintiff's Exhibit 32, "assured minimum 43,000 tons"?

(Testimony of David Taylor.)

A. Because that was sufficient ore on any possible price, any probable price of tungsten, to make adequate security for the money to be advanced; also we wanted to be very conservative, and be sure that any examinations that any possible buyer would ever want to make would substantiate at least what we claimed.

Q. I now call your attention to defendants' Exhibit "U"; in that you state on page 2, paragraph 3, "41,000 tons of fully developed ore on April 1, 1919"; why did you use 41,000 at that time?

Mr. WHEELER.—Same objection.

The COURT.—Same ruling.

A. For the same reason.

Mr. THATCHER.—(Q.) Why the difference between 43,000 to the Crucible Steel Company and 41,000 in the prospectus which you prepared?

A. I didn't remember exactly what had been said in their letters, I didn't have any other letters with me on the train; the necessary tonnage to protect the loan was figured out.

Q. By whom? A. At the time.

Q. By whom?

A. Probably by me, possibly by Mr. Thane; we figured it together probably.

Q. Do you remember exactly how that was arrived at?

Q. Approximately, yes; I don't know whether I could check the exact figures again, I could come very close to it.

(Testimony of David Taylor.)

Q. Is that the reason why there was the difference between the 41,00 and the 43,000?

A. Yes, that is the only reason I know of.

Q. Mr. Taylor, your attention was called to a request from Mr. Poole on behalf of Mr. Nenzel on behalf of the corporation, for an [296—292] additional twenty thousand dollar loan in New York; do you know whether or not that conversation took place? A. I don't remember it, no.

Q. Do you know whether or not they requested an additional loan at that time—you say you don't recollect the conversation? A. No, I don't.

Q. Have you any recollection of Mr. Poole coming to you with reference to an additional twenty thousand dollar advance on the ore contract in New York. -

Mr. COOKE.—Objected to on the ground he has already answered that he does not recall it.

Mr. THATCHER.—Well, he might not recall it in that form.

The COURT.—He may answer the question.

A. I do not remember.

Mr. THATCHER.—That is all.

Recross-examination.

Mr. WHEELER.—(Q.) When you went to New York and met Mr. Thane on the train, I suppose you took Mr. Bancroft's report along with you?

A. Yes.

Q. And it had on it the map, I take it, that you have offered here in evidence as Exhibit 15?

(Testimony of David Taylor.)

A. Yes.

Q. And you and Mr. Thane on the train proceeded to figure out the quantity of ore, did you not? A. I did not, no, sir.

Q. Mr. Thane?

A. I don't know whether Mr. Thane did or not.

Q. I thought you testified a while ago that the difference in figures between your letter to the Crucible Steel Company of April 17th and that in the prospectus, was in one instance you did the figuring and in the other Mr. Thane did the figuring?

A. I think your question just before that asked if Mr. Thane had figured, or if we had figured out the ore according to that Bancroft [297—293] report; my explanation to that was we calculated that was enough ore to repay a loan.

Q. Did you not say that on the train, or is it the fact that on the train Mr. Thane and you had Mr. Bancroft's report with the map, your Exhibit 15 in this case, and that with that map before you, you figured the tonnage represented?

A. I did not so state; no, sir.

Q. What? A. I did not so state.

Q. I ask you if it was the fact?

A. It was not the fact, as far as I know; I don't remember whether Mr. Thane figured that or not; I can explain that if you will let me.

Q. Any explanation you make will be agreeable.

A. We were working on this prospectus from about half past two o'clock, or in the afternoon af-

(Testimony of David Taylor.)

ter lunch, on the Twentieth Century, we had three or four hours to draw up this prospectus and get it typewritten, with the presumption it would have to be corrected a number of times; we worked very fast, and parts of the report I prepared and parts Mr. Thane prepared; Mr. Thane prepared the part of the report dealing with the Hyder examination and mine developments, with the assistance of myself, on the market, and other various clauses in there; some were drawn by me and some were drawn by him.

Q. Who prepared the portion that said, a new survey of this work indicated ore reserve on April 1st of 41,000 tons?

A. Will you let me see the prospectus, I think I can tell you.

(Paper handed to witness.) Mr. Thane prepared all under the heading "Examination." Is that included in your question?

Q. Yes, because the portion I have just read is included under that heading, is it not?

A. No, What was your question, sir?

Q. The question is, did you or Mr. Thane prepare that?

A. Mr Thane prepared that entire paragraph, or two paragraphs. [298—294]

Q. Including the statement that a new survey on April 1st indicated an ore body of 41,000 tons?

A. Yes, sir.

Q. Where did he get the information?

(Testimony of David Taylor.)

A. I could not tell you.

Q. Don't you know that you had Bancroft's report with the map you have here presented, and you laid that before Mr. Thane, and on that he himself figured out 41,000 tons?

A. I can say yes to part of that question; the report was there and it was all before him.

Q. Well, it is your best belief that was the basis, is it not? A. It is not.

Q. Where did he get his information, if you know, that on April 1st there had been a survey, unless he got it from you and from the Bancroft report together?

A. It depends on what you mean by survey; he got his information as to conditions subsequent to the first Bancroft report from me.

Q. By survey I mean on April 1st new survey of this work indicated ore reserve of 41,000 tons; where did he get the information on which he made that statement, if you know?

A. From me; the word "survey" is not used there as a technical survey by instruments; it means general resume of the proposition.

Q. But he did get the information of 41,000 tons from you, didn't he? A. No, sir.

Q. You just said he did?

A. I said he got the report on the conditions of the mine from me.

Q. Where did he get the information on which he based the statement that there was 41,000 tons?

A. I don't know, sir.

(Testimony of David Taylor.)

Q. Do you know of anything else in the shape of information that he had before him, other than your oral statement and the Bancroft report, Exhibit 15, with the map, which you say was amended just [299—295] prior to entering into the contract, Exhibit "C," on April 2d? .

A. He did not, so far as I know.

Q. As early as April the 17th you had sent out a letter saying the result is not an assured minimum of 43,000 tons of ore; who did the figuring in order to get that 43,000 tons?

A. I probably did it myself.

Q. Didn't you do it yourself?

A. I probably did it myself.

Q. Didn't you?

A. I don't know. I don't know whether I did it, or whether I gave the figures of the values, and market, and so on, to somebody else, and asked them to figure out how much tonnage would be necessary.

Q. You can't recollect anything about that, so you can't tell us definitely whether you did it or had somebody else do it? A. I cannot.

Q. You are capable of doing it, aren't you?

A. I am.

Q. And were on April 2d, were you not?

A. I was.

Q. What data did you have other than that you had on April 2d, when you made the figure 43,000 tons, or caused it to be made, that differed in any way from that which you had on April 2d?

(Testimony of David Taylor.)

A. The conditions of the tungsten market were changing from time to time; the exact figures I would use on figuring the necessary quantity of ore one day might not necessarily be the same a week afterward.

Q. So an assured minimum would be indicated by the price of tungsten and not by the quantity of ore in the mines, would it?

A. It would under those conditions.

Q. An assured minimum of 43,000 tons of ore is dependent, not upon what is in the mine, but upon the condition of the tungsten market, is that your answer? A. It is.

Q. Why was not an assured gross of 60,000 tons on April 2d, dependent on the condition of the tungsten market? [300—296]

A. 43,000 tons, a profit on mining 43,000 tons at the then market, and with the costs given, was sufficient to guarantee the security of the investment.

Q. I have not asked you about profits or anything else; you say the tungsten market has to do with the figures, an assured minimum of 41,000 tons, and I ask you why the tungsten market has any more to do with that than it has with an assured maximum of 60,000 tons? A. It has not anything more.

Mr. WHEELER.—That is all.

Redirect Examination.

Mr. THATCHER.—(Q.) Why did you use the words 43,000 tons, Mr. Taylor?

(Testimony of David Taylor.)

A. Because that was all that was necessary to secure the loan.

Q. And that was then, at the then present tungsten market, an adequate security for the loan or the issue which you were then undertaking and putting up to others, is that correct? A. Yes.

Mr. WHEELER.—May I ask? (Q.) You have given your reasons why you did it—

The COURT.—Before he leaves that, I would like to have the witness explain a little more fully what he means by a ton of tungsten ore.

WITNESS.—I may have used the terms inadvisably; you speak of tungsten ore as low grade ore that is mined, that is unsalable, it has to be concentrated to get the best market price, a minimum grade of 65 to 70 per cent tungsten in the form of concentrates; low grade ore is not salable.

The COURT.—(Q.) Of course that is evident; but suppose ore which to-day is salable, the same ore to-morrow is not salable; now the salable ore to-day is ten tons, and to-morrow it is not salable, would you call it ten tons to-morrow? [301—297]

A. I don't think I quite get your Honor's question.

Q. I don't quite understand what you mean by a ton of ore. Is a ton of tungsten ore two thousand pounds, whether it is high grade or low grade?

A. Yes, sir.

The COURT.—That is all.

Mr. THATCHER.—(Q.) Now, Mr. Taylor, right

(Testimony of David Taylor.)

in that connection, your statement is that there were 43,000 tons of ore in your letter to the Crucible Steel Company, what did you give as the value of the ore in the mine; calling your attention to the letter, look at it and see—don't answer till you look? (Hands exhibit to witness.)

A. I didn't give any value of the ore.

Q. Well, what was intended, and what would be understood by saying 43,000 tons of ore?

Mr. COOKE.—I object to that.

Mr. WHEELER.—Objected to as incompetent, irrelevant and immaterial, and hearsay.

The COURT.—I will sustain the objection to that.

Q. You state in here, "An assured minimum of 43,000 tons of ore, part of which is developed on three sides and part on two sides. This is equivalent to 860 tons of 70% concentrates, or 60,200 units WO_3 ." Using the figures which are in that letter, can you tell me whether an expert, or one familiar with tungsten such as the Crucible Steel Company, or anyone else familiar with it, could figure what the value of the 43,000 tons was?

Mr. WHEELER.—Objected to as incompetent, irrelevant and immaterial, the letter speaks for itself.

The COURT.—I will let him answer the question.

A. The Crucible Steel Company would take the value of the concentrates at what they considered the value, according to different prices, whatever

(Testimony of David Taylor.)

they thought it would possibly be worth at different [302—298] times; that price would be based on so much per unit WO_3 in the concentrates; they would calculate from that the value of a ton of concentrates.

The COURT.—(Q.) What is a unit?

A. A unit is twenty pounds is the equivalent of one per cent; when we speak of a unit of tungsten we mean one per cent, one per cent of a ton of tungsten.

Mr. THATCHER.—(Q.) When you say one per cent of tungsten, it is one per cent of WO_3 ?

A. Twenty pounds of WO_3 .

Q. When you say in that letter 43,000 tons would contain 60,200 units of WO_3 , can you translate that back and tell me what the value per ton of tungsten in a ton of ore would be, upon that basis.

Mr. WHEELER.—The witness made no representation in his letter upon that point.

The COURT.—I don't think that is material. In using the terms I thought I would like to know what they mean.

Mr. THATCHER.—(Q.) If 43,000 tons of tungsten will produce 60,200 units what percentage of tungsten does a ton of ore contain.

A. 1.4 per cent.

Q. 1.4 per cent? A. Yes.

Q. Does that mean recoverable tungsten?

A. Yes.

Q. What is 1.4 per cent recoverable tungsten

(Testimony of David Taylor.)

translated into mine tungsten, when you say a basis of 80 per cent recoverable? A. 1.75 per cent.

Q. Could any man familiar with the tungsten market by reading that paragraph ascertain that that 43,000 tons in that mine ran 1.75 per cent tungsten?

Mr. WHEELER.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—I don't think it is material. [303—299]

Recross-examination.

Mr. WHEELER.—(Q.) I am not much interested in the figures just given; some I am very much interested in. "The result is now an assured minimum of 43,000 tons of ore"; by that you intended to say that the result was an assured minimum of 43,000 tons of tungsten ore in that mine, of 2,000 pounds each, didn't you? A. Yes, sir.

Q. And you meant tons, and you didn't mean its value; you meant tons of ore? A. Yes, sir.

Q. Irrespective of its value? A. Yes, sir.

Q. And when you have talked here about a representation to you of 60,000 tons of ore, you meant 60,000 tons of 2,000 pounds each, didn't you?

A. Yes, sir.

Q. Now Mr. Thane, you say, figured 41,000 tons, at least he supplied the figures; on April 17th in the letter that you addressed to the Crucible Steel Company, as I understand you, you yourself figured or caused to be figured in your office, 43,000 tons of ore, is that right? A. Yes, sir.

(Testimony of David Taylor.)

Q. If you figured it yourself what data did you use? A. I used the tungsten market.

Q. No, I am talking about the tons of ore in that mine, not about any tungsten market. 43,000 tons of 2,000 pounds each; where did you get the data on which you got that result? A. April 17th?

Q. Yes.

A. It was stated and represented that the mine contained over 60,000 tons on April 2d.

Q. Yes; and that was all. You used no figures, didn't make any computations, is that right?

A. Used the figures in connection with what?

Q. In arriving at the conclusion that there was 43,000 tons.

A. No, no figures were used. [304—300]

Q. None whatever? A. No.

Q. Then why is it possible that you gave it to some one else to figure out the number of tons of 2,000 pounds each, and got the result 43,000?

A. I didn't say that.

Q. Then the statement that there is forty-three—let me quote it exactly: "The result is now an as-sured minimum of 43,000 tons of ore," is your own statement, and not the statement of any employee whom you directed to figure for you; is that true?

A. Yes.

Q. You stated a while ago that your reason for making that statement was, as I understood you, and also the statement contained in the prospectus, was that you wanted to be sure that if anybody in-tending to go in on the proposition caused the mine

(Testimony of David Taylor.)

to be examined later, there would be no question but that he would find 43,000 tons there. Is that the substance of what you testified to, I don't want to misapprehend you? A. I don't think it is.

Q. Then why put it at 43,000 tons, if I misapprehend you, I do not wish to.

A. My calculations at that time, that 43,000 tons was all the ore that it was necessary to have in any tungsten mine, subject to the costs it would take to get it out, to protect a loan of one hundred and fifty or one hundred and sixty thousand.

Q. Why not put down the sixty thousand tons?

A. I wanted to be conservative, and in case any examination was made by any buyers, we much preferred them to be agreeably surprised when they saw the mine, instead of checking up another way, and disappointed; and 43,000 tons was all that was necessary to secure the loan.

Q. So it was for that reason and not because you thought there was an assured minimum of 43,000 tons that you made that statement?

A. The statement was made for both reasons.

Q. In other words, you didn't want anybody who went out there to find there was less than 43,000 tons, and you thought they might [305—301] find less than 60,000 tons, didn't you?

A. I didn't think they might, I didn't think one thing or another; I didn't want them to find any less.

Q. In other words, you thought it was necessary to put that down to 43,000 because you were not

(Testimony of David Taylor.)

sure they would find 60,000; is not that true?

A. It is not.

Q. You were perfectly sure, without a shadow of doubt in your mind, that they would find 60,000 tons?

A. I was sure there was 60,000 tons there, as Mr. Poole had so stated.

Q. And so without one mental reservation you were prepared to assure people that there were only 43,000 tons there, though you were trying to induce them to go into the proposition, is that the fact?

Mr. THATCHER.—I object; that is not in evidence; the letter shows an assured minimum of 43,000 tons; counsel said not more than 43,000 tons.

Mr. WHEELER.—I don't think there was that difference in the question; if there was I will recast it.

Q. When you wrote this letter dated the 17th of April, you had not conversed with Mr. Thane, had you? A. No, sir.

Q. You had not had your conversation on the train that you have testified to here as having taken place with Mr. Thane? A. No, sir.

Q. You wrote this letter with the hope and expectation of presenting a proposition so good that the people would come in and subscribe to this undertaking, didn't you? A. Yes, sir.

Q. That was your very object in doing it; if you had absolute, complete and perfect faith that there was 60,000 tons of ore there, why did you not say 60,000 tons instead of 43,000?

(Testimony of David Taylor.)

A. Because 43,000 was all that was necessary to secure the amount [306—302] of money I was asking them to put up.

Q. You were trying to induce these people to come in, and make your proposition as attractive as possible, weren't you? A. Yes.

Q. If you were trying to do that, why did you not make it more attractive by saying 60,000 tons instead of say 43,000 tons?

A. I said at least 43,000 tons, and I thought that was attractive.

Q. You don't think 60,000 tons would be more attractive than 43,000 tons?

A. Naturally it would be.

Q. And yet you didn't put down 60,000 tons, although you had not the slightest doubt or question but that 60,000 tons were there?

A. That is correct.

Q. Why didn't you make it as attractive as you could?

A. I thought I was making it attractive enough as it was.

Mr. WHEELER.—That is all.

Mr. COOKE.—Just one question. (Q.) How did the price of tungsten April 17, 1919, compare with the price of tungsten April 2d, 1919?

A. I can't remember offhand; I should say it was probably about the same.

Mr. THATCHER.—Can you find out; have you any memoranda here?

A. No; there is no definite price of tungsten; it

(Testimony of David Taylor.)

is a question of get what you can at the time.

Mr. COOKE.—(Q.) It fluctuates, up and down?

A. Yes.

Q. Would the price go down during that time, rather than up?

A. That is the general tendency; I don't think it commenced to go down really till later; I think it was about stationary February, March and April.

Q. How much do you think it was a unit during the month of April, between April 1st and April 17th?

A. I think I sold some concentrates belonging to this company for about nine dollars and a quarter a unit along in that time.

Mr. COOKE.—That is all.

Mr. THATCHER.—Call Mr. Jackson.

[307—303]

Mr. COOKE.—I would like to ask the Court and counsel to introduce a witness who is here, and has come specially from San Francisco. I do not like to interrupt the order of your proof; it will be short.

Mr. THATCHER.—That is all right; we will be glad to accommodate you, Mr. Cooke.

Testimony of Edson F. Adams, for Defendants.

Mr. EDSON F. ADAMS, called as a witness on behalf of defendants, after being sworn, testified as follows:

Direct Examination by Mr. COOKE.

Q. State your name, please?

(Testimony of Edson F. Adams.)

A. Edson F. Adams.

Q. And your residence?

A. San Francisco, California.

Q. Are you acquainted with the Nevada Humboldt Tungsten Mines Company? A. Yes.

Q. During the year 1919, and in the month of June, 1919, did you have any unsettled business relations with that company?

A. Yes; the Nevada Valleys Power Company, of which I was President, had.

Q. Did you have anything yourself, personally?

A. Not personally.

Q. But it was the Nevada Valleys Power Company? A. The Nevada Valleys Power Company.

Q. And that was some claim for power furnished by your Company to the Nevada Humboldt Tungsten Mines Company? A. Yes.

Q. Can you state approximately how much the claim was?

A. Between five and six thousand dollars; that is, the claim we had against them and the Products Company.

Q. Do you know anything about a meeting of creditors, or a number of creditors of the Nevada Humboldt Tungsten Mines Company, that [308—304] was held on or about June 7th, 1919?

A. Yes, I was present.

Q. You were present. Where was that meeting held?

A. In Frieberg & Eels' office, in the Hobart Building, San Francisco.

(Testimony of Edson F. Adams.)

Q. Have I the date correct as you recall it, June 7th? A. June 7th.

Q. Do you know about how many creditors there were represented at that meeting?

A. No, I do not, but there must have been fifteen or twenty at least.

Q. Do you recall approximately the amount of the debts that they represented?

Mr. THATCHER.—I object to that as incompetent. This witness can hardly be competent to testify as to how much.

Mr. COOKE.—The discussion that was had there in the presence of Mr. Taylor, or his representative.

The COURT.—Well, if he knows how much the debts amounted to, he may say.

WITNESS.—I understood you asked how many of the creditors were present—how much was present?

Mr. COOKE.—No, the question now is approximately how much was represented there in the way of indebtedness?

Mr. THATCHER.—If you know.

A. I do not know positively; the major portion was there.

Mr. THATCHER.—(Q.) Do you know that?

A. Yes, I think that I do.

Q. Do you know how much the Tungsten Company owed at that time?

A. They owed—

Q. (Intg.) Do you know?

(Testimony of Edson F. Adams.)

A. I know from the statement that I saw there at the time. [309—305]

Q. Yes, but the question is, do you know how much the Nevada Humboldt Tungsten Mines Company owed at that time; do you know of your own knowledge, Mr. Adams?

A. All I know is from the figures that I saw there.

Mr. THATCHER.—Object to it on the ground it is hearsay.

The COURT.—If it is material proof of the point, I think you had better prove it in the regular way.

Mr. COOKE.—It is not specially material, your Honor.

Q. Did you meet Mr. Poole and Mr. Murrish and Mr. Nenzel at that meeting? A. Yes.

Q. Did you see Mr. Taylor, the plaintiff in this case, at that meeting? A. Yes.

Q. Do you know Mr. Jackson, one of the attorneys, in this case?

A. I met him there at that meeting.

Q. Did you also meet a lawyer in San Francisco named Bayless, was he there? A. He was.

Q. Do you recall the circumstances of some proposition that had been made by Mr. Taylor to the Nevada Humboldt Tungsten Mines Company, and to its creditors, being presented to that meeting?

A. Yes, there was a proposition that was made there, which was read.

Mr. THATCHER.—Move to strike the answer

(Testimony of Edson F. Adams.)

on the ground it is not responsive. The question is do you remember.

WITNESS.—Yes, I do remember.

Mr. COOKE.—(Q.) You recall that there was a proposition made; was that proposition in writing?

A. It was.

Q. And who read this proposition that you referred to? A. I do not remember.

Q. Do you recall that it was read or submitted to the meeting in any form?

A. Yes, it was in the form of a contract submitted [310—306] to the meeting.

Q. Go on and tell us what you remember about the submission of the form of contract?

The COURT.—Let him tell what occurred at the meeting.

WITNESS.—What occurred at the meeting, or the reading of the contract?

Mr. COOKE.—Yes, sir.

A. You mean what occurred at the meeting?

Q. Yes, sir, what was said and what was done with regard to this contract?

A. Well, there was Mr. Murrish first, and then Mr. Poole made a statement with regard to the mines; and there was also some questions, quite a number of questions asked in regard to the financial report, and then it was proposed that this contract, a proposed contract should be read, and it was finally decided it should be read to the creditors. Some one started to read this contract, and got pretty well along in it, when I got up and said that

(Testimony of Edson F. Adams.)

I didn't wish to hear any more of the contract read, and also opposed the adoption of any such arrangement; I mean the creditors endorsing any such contract as read; it had not been completed, but I heard all I wished to hear of it.

Q. Did you state to any of those present your reasons for not caring to hear any more of it read?

Mr. THATCHER.—I object to his reasons as immaterial.

The COURT.—What is the materiality of this testimony?

Mr. COOKE.—The plaintiff in this case claims that he presented a contract to the defendant and to its creditors, that in equity ought to be accepted, and we want to show that the creditors absolutely refused to accept it.

The COURT.—That testimony is in already, isn't it? They have already proven that the creditors refused to accept that contract.

Mr. COOKE.—I think the circumstances of the refusal would be [311—307] important for the Court to know.

(By direction the reporter reads the question.)

The COURT.—You may answer that yes or no.

A. Yes, I stated briefly.

Mr. COOKE.—(Q.) What did you state?

Mr. THATCHER.—Object to it as incompetent, irrelevant and immaterial.

The COURT.—Well, I will let him put it in.

A. I do not remember exactly my language. Of course I opposed the acceptance of the contract.

(Testimony of Edson F. Adams.)

Q. Give us your best recollection as to what you stated to the meeting as your reasons.

Mr. THATCHER.—I object to that as incompetent, irrelevant and immaterial; that is just his mental attitude.

The COURT.—What is the purpose of getting the reasons out?

Mr. COOKE.—It is a part of the showing of the defendants in reference to a transaction to which Mr. Bayless testified, where he undertook to show that the defendants promised Mr. Taylor that they would urge the creditors to accept this, and Mr. Bayless further stated that they didn't urge the creditors to accept the contract, implying they had violated their promise to Mr. Taylor; we want to show what took place there.

The COURT.—Is this testimony to contradict anything that Mr. Bayless testified to?

Mr. COOKE.—Not specifically; I don't think it would be in this particular part here.

The COURT.—It seems to me you are loading up the record.

Mr. COOKE.—Very well. I think that is all.

Mr. THATCHER.—That is all.

(By agreement of counsel Mr. Adams is excused from further attendance in court.) [312—308]

The COURT.—Do you propose to put on any further evidence with regard to what happened at that meeting, Mr. Thatcher?

Mr. THATCHER.—Well, I haven't any further evidence.

(Testimony of Edson F. Adams.)

The COURT.—Before Mr. Adams goes I would like to find out about that. If there are to me any further facts developed by you with reference to what occurred at that meeting, I would like to know now what they are.

Mr. THATCHER.—They will be no different from the testimony of Mr. Bayless, nor will they be as much.

The COURT.—I don't want to shut this testimony out simply because it seems to be irrelevant at the present time.

Mr. THATCHER.—My objection went particularly to the proposition he was asked why he objected to it, and what reasons he stated for objecting to it. What he did makes no difference; what attitude Edson Adams took in the meeting is immaterial; the question is what the defendants did.

The COURT.—You may put that testimony in if you wish, Mr. Cooke; it will simply be in the record to be used or excluded later as I see fit.

Mr. COOKE.—I think we have covered all we want to cover. [313—309]

Testimony of John G. Jackson, for Plaintiff.

Mr. JOHN G. JACKSON, called as a witness on behalf of plaintiff, testified as follows:

Mr. WHEELER.—Mr. Jackson being a member of the Bar, I will waive the oath.

Direct Examination by Mr. THATCHER.

Q. What is your name? A. John G. Jackson.

Q. Where do you live? A. New York City.

(Testimony of John G. Jackson.)

Q. What is your business or profession?

A. I am a lawyer.

Q. How long have you practiced in New York?

A. Since the 20th day of July, 1903.

Q. Have you been in the active practice of your profession during all of that time?

A. I have, sir.

Q. Do you know Mr. David Taylor? A. I do.

Q. Did you meet Mr. Taylor in New York in the month of April or May, 1919?

A. It was in May, as I recollect I met Mr. Taylor the early part of May.

Q. Did he come in to consult with you professionally? A. He did.

Q. Will you state what matter he presented to you, and the terms of the contract between yourself and Mr. Taylor?

A. Mr. Taylor told me that he was interested in the properties of the Nevada Humboldt Tungsten Mines Company in Nevada, and that he had a contract or contracts, which he then showed me, covering the terms of his interest. He at that time showed me the contracts which are marked as Exhibits "A," "B" and "C," annexed to the pleadings, and I went over them with him, talked to him about them, and in a general way discussed what he was doing to fulfill his undertaking.

Q. Did he employ you to take any part with reference to those contracts? [314—310]

A. He did. We had a preliminary discussion

(Testimony of John G. Jackson.)

directly after our first conference as to whether or not I would come out to Nevada and participate in the reorganization of the existing company, or in the organization of a new company, as might seem best, and look into the titles and the other usual matters connected with such issues of stock.

Q. Were you also to go into the question of the issuance of any additional or different stock?

A. Yes.

Q. And to look after such issues?

A. To look after the issues, yes; generally to see that the whole situation was in order from the point of view of a New York business man or investor.

Q. At that time did you make any contract or have any understanding with Mr. Taylor as to your compensation for this service?

A. Mr. Taylor agreed to pay my firm a fee of five thousand dollars, and expenses for the trip.

Mr. COOKE.—Will you fix the time?

Mr. THATCHER.—(Q.) Can you say when that took place?

A. The agreement with regard to the fee?

Q. I mean when Mr. Taylor first consulted you with reference to the situation?

A. I should think it was around the 5th or 6th of May, somewhere about that time.

Q. Mr. Jackson, were you in your office on the day that Mr. Thane sent a telegram to Mr. Bancroft, asking him to make the examination?

(Testimony of John G. Jackson.)

A. I was. That telegram of May 14th was dictated in my office, which then was at 30 Pine Street, New York.

Q. Had you been consulted with reference to this situation and the Nevada Humboldt Tungsten Mines Company, and Mr. Taylor's contracts with reference to it, prior to that time? A. I had.

Q. And was your arrangement with Mr. Taylor made prior to that time? [315—311]

A. It was tentatively made prior to that time, and subject to Mr. Thane's approval; he approved it at that time, on the 14th day of May, in my office, and said that he would like to have Mr. Bayless also assist Mr. Taylor in this examination, and do some preliminary work; so that on that day telegrams were sent both to Mr. Bayless and to Mr. Bancroft.

Q. Did you come on afterward, pursuant to that understanding, to Nevada? A. I did.

Q. How much of your fee has been paid to your firm in that matter?

A. Twenty-five hundred dollars.

Q. What is your understanding with reference to the situation as it now stands?

A. Well, my understanding is that we forgave Mr. Taylor the balance of the fee in view of the unfortunate outcome of the affair; I have no intention of asking for any more.

Q. You do not claim Mr. Taylor is indebted to you for anything more than the amount which has been paid?

(Testimony of John G. Jackson.)

A. I do not, we are fully paid.

Q. Mr. Jackson, you then came on from New York to Lovelock? A. I did.

Q. Can you tell me for what purpose, and how you came to come on here?

A. My plan when I left New York was to go directly to San Francisco, and there to take up with Mr. Bayless the work he had done, on the understanding that all of the corporate records and papers of all necessary sort would be in San Francisco at that time. En route I received a telegram from Mr. Taylor to stop at Lovelock and go into matters there, so I did, and I arrived there on Thursday, May 29th, if my recollection is correct as to the date, Thursday morning.

Q. Did you see Mr. Taylor there?

A. Mr. Taylor arrived the following Saturday morning. [316—312]

Q. And when Mr. Taylor arrived did you see any of the defendants?

A. I did; I met Mr. Nenzel, Mr. Murrish and Mr. Jones at the office of the company; Mr. Poole did not arrive there until Saturday morning.

Q. What did you do while you were there before Mr. Taylor arrived?

A. I examined the charters, minute books and other corporate records, such as contracts; I discussed at very considerable length certain features of the situation with Mr. Murrish; I checked the corporate activities and corporate history of the

(Testimony of John G. Jackson.)

three companies with the requirements of the law of Nevada, and also discussed certain questions which then presented themselves to me, with Mr. Murrish at length; we had a number of conversations with regard to the legal aspects of the situation. I also ascertained the organization of the company, its officers and directors, and one or two other questions were taken up also, such as a survey.

Mr. COOKE.—What date was this?

A. This was on Thursday and Friday, the 29th and 30th of May. I did not discuss at very great length the proposed reorganization of the present company; we did discuss it somewhat, but I did not commit myself to a plan, because my recollection is by the time I was ready to discuss that I had received a telegram from Mr. Taylor, which indicated that he did not want me to take that up until he arrived and talked to me; he gave me no reason for that request.

Mr. THATCHER.—(Q.) Mr. Jackson, when Mr. Taylor arrived, did you and Mr. Taylor take any trip with any of the defendants, or go to any place?

A. We did.

Q. Where did you go?

A. On Saturday we took the train from Lovelock to—I think the name of the station was Mill City; in any event, we took the train to the nearest station to the mine, and went from there by automobile to the mine. [317—313]

(Testimony of John G. Jackson.)

Q. And who went on that trip, yourself, Mr. Taylor, and who else? A. And Mr. Poole.

Q. And you went up to the mine?

A. We did, all three of us went to the mine.

Q. When you got to the mine—was there any conversation took place with reference to the mine at first on the way up, do you recollect?

A. Yes. When Mr. Taylor arrived at Lovelock he informed Mr. Poole that Mr. Bancroft had reported that the mine contained something less than 20,000 tons of commercial ore, and he was very much astonished and upset, because he had understood—I believe Mr. Poole had told him—that there were certainly over 60,000 tons of commercial ore, and he could not understand it; Mr. Poole said he could not understand it, and so—

Mr. WHEELER.—The conversation between these parties is objected to as far as the defendant Loring is concerned; it is incompetent, irrelevant and immaterial as to him.

Mr. COOKE.—It is also objected to by all the other defendants, except the defendant Poole, as not binding upon them.

The COURT.—I will follow the same rulings heretofore made.

Mr. THATCHER.—If the Court please, the defendant Poole held the power of attorney for some of the stockholders; if these things were communicated to him, they were communicated to those for whom he was acting.

(Testimony of John G. Jackson.)

The COURT.—Well, it will be considered then, as far as those powers of attorney will admit, as against the defendants who gave the powers of attorney.

Mr. WHEELER.—I had no opportunity to object to the question; it slipped into the evidence as to the conversation with Poole before I could know what it was; for that reason I ask that it be limited so far as it has already gone. [318—314]

The COURT.—It is so ordered.

Mr. THATCHER.—Do you know where you left off, Mr. Jackson?

A. I think perhaps I had better start over again. The conversation in Lovelock, when Mr. Poole, Mr. Taylor and myself met, the discussion as I recollect was on the sidewalk; we walked up and down for quite a while, discussing the situation. Mr. Taylor said first to Mr. Poole that Mr. Bancroft had reported something less than 20,000 tons of commercial ore in the mine; Mr. Taylor was very much upset, because he had started for New York some time ago prepared to close the deal, and Mr. Bancroft's report had come along, and he was extremely disappointed.

Mr. COOKE.—That is what he said?

A. This is what Mr. Taylor said. Mr. Poole said he, too, was very much surprised; I can't say exactly his words, don't pretend to, but the substance of it was that he could hardly believe it. We then agreed the best thing to do was to go up to the

(Testimony of John G. Jackson.)

mine and see what was the best thing to be done. We took the train and went up to the mine; on the railroad this conversation was discussed with some detail as to various parts of the mine; I am not sufficiently familiar with mining to have that impressed on my mind at all.

Mr. THATCHER.—(Q.) After you got to the mine, did you go down the mine? A. I did.

Q. Who went with you?

A. Mr. Poole and Mr. Morrin, the superintendent, took me down in the mine.

Q. Did you go through various workings in the mine?

A. I understand I was taken through the whole mine.

Q. You understand that how? A. Mr. Poole.

Q. What did they do while they were down the mine, while you were with them?

A. Shall I describe?

Q. Describe it as near as you can. [319—315]

A. In various places they chipped off some of the surface rocks, dirt, and so on, put it in a pan and put water in the pan; and swished it around until there was a certain residue left; I believe the operation is called panning.

Q. Did they take many pannings while they were down in the mine?

A. They took quite a good many; we were down in the mine I should say between two and three hours—it seemed longer than that to me.

(Testimony of John G. Jackson.)

Q. After you came up did you meet Mr. Taylor?

A. I did.

Q. Was Mr. Taylor with you?

A. Mr. Taylor was with me.

Q. Where did you meet Mr. Taylor?

A. We met either in or just outside of the mine possibly; we immediately went into the mine office.

Q. What took place then, and what was said.

A. Mr. Taylor came up and said, "Well, what about it"? Mr. Poole said, "Bancroft is right, the foreman lied to me."

Q. Then what happened, Mr. Jackson?

A. My recollection is that shortly after that we took the train back to Lovelock—had dinner on the train.

Q. After you got back to Lovelock did you see any of the defendants at that time, when you got back to Lovelock?

A. We got back to Lovelock late in the evening, and we met Mr. Goodin at a hotel. I think it is the Big Meadows Hotel, and had a conversation with him; the situation was stated to him just as Mr. Taylor had told it to Mr. Poole with regard to representations made in April that there was 60,000 tons of ore, that Bancroft now reported only 20,000 tons of commercial ore; that Mr. Taylor had proceeded to raise this money on the understanding that this was in effect a banking proposition, and the value of the ore disclosed would secure the money advanced; that under the circum-

(Testimony of John G. Jackson.)

stances as they now existed, according to Mr. Bancroft's report, Mr. Taylor could not put his money in that [320—316] business in any other way than on the basis on which it had been raised.

Q. That was to Mr. Goodin?

A. That was to Mr. Goodin. Mr. Goodin used some rather strong language, and he seemed considerably upset, too; as I recollect, he said something to the effect that he had been more or less fooled, too.

Q. On the mine? A. On the mine.

Q. Now after that what happened, Mr. Jackson; where was Mr. Poole at this time?

A. Mr. Poole had gone off to his home, I think to get his bag, or something of that kind, or to see Mr. Nenzel and Mr. Murrish; we all planned to go to San Francisco that night.

Q. You were all planning to go to San Francisco that night? A. Yes.

Q. Was that a new or an old arrangement?

A. That arrangement had been made in the morning in Lovelock before we went to the mine.

Q. Do you know what the purpose of going to San Francisco was?

A. Mr. Taylor and I wanted to go there, because we felt that it would be possible with the co-operation of creditors to make a deal on substantially the same lines of the April 2d contract, with the advances pro-rated to the condition of the mine as disclosed by Mr. Bancroft; that was the reason

(Testimony of John G. Jackson.)

we wanted to get to San Francisco; there was nothing more we could do in Lovelock, and it seemed to us that San Francisco was a better place to negotiate.

Q. Was there any agreement or understanding between Mr. Taylor or yourself, or any of the defendants, about going down there; as to whether or not that was the place where the contract was to be closed up, or where the papers were, or anything of that kind, if you recollect? [321—317]

Mr. WHEELER.—I understand your Honor's ruling to be this is all confined to the defendants named, and not to these unnamed or unaffected by the powers of attorney?

The COURT.—That will be understood all through the case, unless there is a different order made; that is, as to conversation.

Mr. THATCHER.—As to conversation, for instance, if the conversation is later brought home, or the actual facts are in turn brought home to any other of the defendants, I think it might become binding upon them; it will all depend on the chaining up of the various conversations.

The COURT.—Well, I will leave it just as it was before I made the last statement.

WITNESS.—If I understand your question, Mr. Thatcher, we had not represented or told any of the defendants who were present, that is, in Lovelock, that we were going down at that time, on that Saturday, to pay over the money in the full

(Testimony of John G. Jackson.)

extent; Mr. Poole had been told the situation, and he had been told that of course under such conditions, as they were then, Mr. Taylor could not pay over the full \$150,000.

Mr. THATCHER.—(Q.) Do you know whether or not at Lovelock Mr. Poole was informed as to any other proposition that you would make?

A. That was discussed on the way back from the mine, to Lovelock, the proposition of advancing money to the company, which would pay a substantial dividend to the creditors, and which would be secured by the amount of ore actually blocked out; I am not sure whether on the train the exact amount was discussed or not; but I think it was, and I think the amount then mentioned was \$75,000.

Q. From there you went on to San Francisco?

A. Yes.

Q. Did you meet the defendants at any time down there? [322—318]

A. We did.

Q. State when and where, the persons present, and what took place.

A. We reached San Francisco Sunday afternoon; our first conference was the following day, Monday; that was June 2d, I think; the meeting was at the office of Mr. William S. Bayless, in the Crocker Building, and those present at this first conference were Mr. Taylor, Mr. Bayless, Mr. Poole, Mr. Nenzel, Mr. Jones and Mr. Murrish. At that conference I acted as the spokesman for Mr. Tay-

(Testimony of John G. Jackson.)

lor, and when we were all in Mr. Bayless' office I said that in view of the developments in connection with the mine it seemed to me in order to state the full history of the case and the full facts of the situation, in order to see if some fair deal could not be reached; and in order to be sure that we were proceeding on common ground, I wanted to state to the gentlemen who were representing the mine and the stockholders what my understanding of the facts was; and I said that I would like to be corrected if I went wrong at any time in their judgment during the course of my statement. With that preliminary, I went back, as I recollect now, to the January contracts; I said that Mr. Taylor had then made two contracts, one with the stockholders and one with the company; the contract with the company provided for the advance of money against concentrates for the purpose of more or less financing the company at a time when the tungsten market was bad, and permitting them to gradually liquidate some debts, and develop the property; that as a part consideration for this contract the stockholders had given to Mr. Taylor an option to buy the mine for \$500,000.

Q. You say an option to buy the mine, you mean the stock?

A. The stock of the mine, yes; it was not all the stock, it was so much a share, which in the aggregate would fix the value of the stock at \$500,000; there were a few shares these gentlemen didn't pretend to [323—319] control; following the

(Testimony of John G. Jackson.)

making of these contracts Mr. Taylor had found it impossible to interest people in the purchase of this stock at that price, and accordingly they had met in his office in Denver. There, after considerable negotiation, a new contract, dated April 2d, had been entered into; prior to executing that contract, and as a reason for entering into it, Mr. Poole had represented to Mr. Taylor that the mine contained 60,000 tons of commercial ore; it now developed that that representation was a mistake; Mr. Bancroft had just examined the mine, and reported that there were but 20,000 tons of commercial ore in the mine; that under those circumstances, while Mr. Taylor had come west from New York with the money to close the deal, and expected to close it, he now could not put into this company's treasury to pay its debts, or for any other purpose, the money which he had in part raised himself, and in part from his friends on one basis, whereas there had now developed an entirely different condition of affairs. I continued to say that, nevertheless, in spite of this situation, Mr. Taylor was very much interested in this mine, and that he would like to work out with them an equitable and fair deal, which would be substantially on the same basis, and even more favorable to the company than the basis set forth in the April contract. I was authorized to offer to the company an advance of \$75,000 to be secured by concentrates, and in addition to that—I am not sure whether it was on the first interview, but certainly was later,

(Testimony of John G. Jackson.)

Mr. Taylor authorized an additional advance of \$10,000, to be used as working capital. I also said that some arrangement would have to be made with the creditors, so that to the extent that this \$75,000 did not pay them all, they would not interfere with Mr. Taylor's security; that he was entitled to work his money out of the ore blocked out, as certified by Mr. Bancroft; and that when an additional 20,000 tons of ore were blocked out he would [324—320] advance the balance of the money to pay off the rest of the creditors. The suggestion I made was that all creditors whose claims were \$500 or less, be paid off in full, and that the remaining creditors be paid pro-rata. It figured a dividend, as I recollect, of about forty-five per cent to all of the other creditors, and excluded Mr. Taylor, who was a secured creditor. On Tuesday I think we had no meeting, the matters were under consideration; and on Wednesday we had one or two meetings; there were various details discussed of one kind or another. I recollect that among the matters discussed was the personnel of the board of directors and the officers of the company, and my recollection is now that—

Mr. WHEELER.—Of the old company, or a new company to be organized?

A. Well, I have just come to that, Mr. Wheeler. My recollection is—I am certain as to the fact, but could not swear whether it was Wednesday or Thursday morning, we came to an agreement that a new company was to be organized, and to issue

(Testimony of John G. Jackson.)

preferred stock—not preferred stock, but to issue bonds for the amount of its claims. Mr. Taylor agreed to buy \$85,000 worth of these bonds; \$75,000 was to be applied in payment of claims, and \$10,000 was to remain as working capital; the personnel of the company, of the directors and managers, was agreed upon; my recollection is that Mr. Taylor was to be president, Mr. Thane was to be the engineer or supervisor in charge of operations—consulting engineer; and Mr. Poole was to be in charge of operations at the mine; I think one director was to be agreed upon by the creditors, and the fourth I have forgotten, I don't remember who it was. That, in outline, is the proposition; it was agreed upon and accepted by all concerned, and then the discussion came up as to who should embody this in writing; it was suggested variously Mr. Poole, Mr. Murrish or myself should [325—321] draw the contract, finally it was put up to me, and I said I would, with the understanding that what I prepared would be a tentative draft, subject to revision; it seems to me we were all agreed on the substance of the proposal, and the nature of Mr. Taylor's security, and I would prepare a draft on that understanding; and from that point of view; I went back to my room at the hotel, wrote it out in long hand then gave it to the hotel stenographer, who wrote it out, and it was put, I think two copies, certainly one copy and I think two copies, in the mail box, of the representatives of the Nevada company or the stockholders of the Nevada Humboldt

(Testimony of John G. Jackson.)

company. According to appointment previously made, we met in Mr. Bayless' office at seven-thirty on Friday night to discuss this contract, and make any revisions that seemed advisable; those present at that time were Mr. Poole and Mr. Nenzel; Mr. Murrish and Mr. Jones were not present. Mr. Poole said that Mr. Murrish did not care to make any changes in the contract, that it was satisfactory; that they would submit it to the creditors at a meeting which they called for to-morrow, and would recommend and urge its acceptance. That was as satisfactory as we could hope or expect from any point of view, and the meeting then adjourned. Following it the creditors' meeting was held; Mr. Taylor and I were not permitted to attend until the very end of the meeting; it was just before lunch time when we went over to the meeting at the office of some engineers, Freitag & Ainsworth, I think it was, and we found it was impossible to do anything with the gentlemen present for several reasons; in the first place—I am not permitted to say the reasons, I suppose. I think that about concludes.

Mr. THATCHER.—(Q.) Do you recollect anything I have forgotten to ask you, Mr. Jackson? That covers generally your connection with the situation? [326—322]

Mr. WHEELER.—Objected to as calling for the opinion and conclusion of the witness.

Mr. THATCHER.—That is all; you may cross-examine.

(Testimony of John G. Jackson.)

WITNESS.—I would like to add one statement, if I may, to my recollection of the interview of June 2d, Monday; that is, during the course of the conversation as I made statements, or concluded a statement of fact in regard to the history of this matter, I would ask the gentlemen from time to time whether that was correct; I would say, “Is that correct”? And at no time during that meeting was a statement contradicted; and in several instances Mr. Poole acquiesced by nodding his head or saying, “Yes, that is so.” That is particularly true, I would like to say, with regard to the representation as to the quantity of ore, commercial ore, in the mine, because I had that especially in my mind when I made the statement to see whether it was admitted or whether it was not admitted; I have a very distinct recollection of it.

Cross-examination.

Mr. WHEELER.—(Q.) In other words, you were trying to get an admission right there, weren't you; that was your scheme and plan?

A. My plan was to see if they were together on the facts, and if the facts were correct as I stated them, to have them admit them.

Q. It was your plan to try to get by silence or acquiescence an admission that that charge was true, wasn't it? A. I have stated my plan.

Q. I ask you to state it again in response to my question. A. My plan was—

Q. Read the question.

(The reporter reads the question.)

(Testimony of John G. Jackson.)

A. An admission of what, Mr. Wheeler?

Q. I dislike to go back to the context, was it not your plan, and [327—323] did you not deliberately frame your statement with the idea of getting from those men there present, either affirmatively or by silent acquiescence, an admission that the charge of false representations was true? A. I did.

Q. So you had planned that before the meeting, and had blocked out in your own mind just what you were going to say on that point, hadn't you?

A. Yes, sir.

Q. At that time you had had some discussion of a suit for damages as being possible, hadn't you?

A. None whatsoever.

Q. In New York when you were first employed, can you name the exact day? A. No, I cannot.

Q. Can you name the exact day upon which it was agreed that your firm should receive \$5,000?

A. No, sir, excepting that it was prior to the 14th day of May, and it was confirmed on that day in our conference with Mr. Thane.

Q. As I understood you, it had been made subject to Mr. Thane's agreement?

A. Yes, Mr. Taylor said he expected to have Mr. Thane interested in the mine, or have something to do with the management of it when the deal was closed, as they expected then to close it at the end of that month, so he would like Mr. Thane to approve; also Mr. Thane, he said, had been negotiating with some people in New York, who would probably take preferred stock after it had been

(Testimony of John G. Jackson.)

issued, and so he wanted to find out whether in view of that possible sale of stock, it would be acceptable to Mr. Thane to have us pass on the matter, or whether Mr. Thane would rather have some other New York firm.

Q. At any rate, you didn't consider the matter closed until the 14th, when you got Mr. Thane's approval?

A. You mean definitely committed?

Q. Yes. A. No, I won't say so. [328—324]

Q. So the agreement to pay your firm \$5,000 was concluded coincidentally with the arrangement to telegraph Mr. Bancroft?

A. I think that is correct, sir.

Mr. WHEELER.—In behalf of the defendant Loring, your Honor, it now being apparent that these expenses in the shape of counsel fees were incurred after the determination had been reached to have an independent investigation, we ask that the evidence to that effect be stricken from the record.

Mr. COOKE.—I wish to join in the same motion.

(Argument.)

The COURT.—I do not feel quite so clear about this matter as counsel does, and while I think the testimony is very weak as to Mr. Taylor's absolute reliance in the statements that were made after he met Mr. Thane on the train, still he has testified that he did rely on those statements, and I can imagine how at that time he wanted to interest Mr. Thane in this matter, that he was absolutely

(Testimony of John G. Jackson.)

compelled to yield to him, and to agree to have a further investigation made; and he would have been an unwise man if he had made up his mind so fully at that time that he would not change it later, if there were an adverse report by Mr. Bancroft. But I do not feel at this time like striking that testimony out; still I think the argument has a great deal of force; it is a matter that ought to be considered, and probably will be considered; it is something that has been in my mind all day, or ever since that line of questioning was taken up by Mr. Wheeler.

(An adjournment is taken at 4:35 P. M. until Monday, September 20th, 1920, at 10 o'clock A. M.)
[329—325]

Monday, September 20th, 1920.

Court convened, 10 o'clock A. M.

Mr. JOHN G. JACKSON on the witness-stand.

Mr. WHEELER.—I understood your Honor had formally ruled on that matter at the last hearing?

The COURT.—Yes, I have thought about that somewhat since the recess, and I am inclined to adhere to the ruling made.

Mr. WHEELER.—We of course reserve our exception. No further questions, Mr. Jackson.

Mr. THATCHER.—I think there are no further questions, but I would like to reserve the right to ask any questions necessary, if the Court please.

Testimony of David Taylor, for Plaintiff (Recalled).

Mr. DAVID TAYLOR, the plaintiff, recalled for further direct examination.

Mr. THATCHER.—(Q.) Mr. Taylor, you testified while in New York you sold certain securities for the purpose of having money available for this deal. Have you a memorandum, or can you tell us the dates when these securities were sold?

A. I have a memoranda.

Q. Where is it? A. It is in that file.

Q. Did you prepare this memoranda yourself?

A. I did.

Q. What from? A. From my own books.

Q. Is this the one. (Showing paper to witness.)

A. Yes.

Q. What securities did you sell, Mr. Taylor; state the dates, character of the securities, whether bonds or stocks?

Mr. WHEELER.—Objected to as incompetent, irrelevant and immaterial. [330—326]

Mr. THATCHER.—For the purpose of showing reliance upon the representations of the defendants in this case.

Mr. WHEELER.—Whether stocks or bonds don't tend to show any reliance.

The COURT.—I will overrule the objection.

WITNESS.—Shall I read a list of these?

Mr. WHEELER.—The witness is testifying from a memoranda made by him when?

(Testimony of David Taylor.)

Mr. THATCHER.—(Q.) When did you make the memoranda, Mr. Taylor?

A. The memorandum was made up yesterday—Saturday.

Q. Show it to counsel. (The memorandum is handed to counsel for defendants.)

Mr. WHEELER.—We object to the use of the memoranda as incompetent, irrelevant and immaterial, self-serving and hearsay.

The COURT.—I think the objection is good.

Mr. THATCHER.—To the use of it? I have not offered it in evidence, if the Court please.

Mr. WHEELER.—Well, I object to its use, being a recent memoranda made by the witness yesterday, he says.

The COURT.—I suppose he wishes to testify as to the stocks and securities that he disposed of.

Mr. THATCHER.—Yes, sir. It would merely mean using the memoranda to refresh his memory.

The COURT.—Well, a memoranda made at about the time that the transaction occurred would be proper for that purpose, but this was made only yesterday.

Mr. THATCHER.—(Q.) Have you your books here, Mr. Taylor? A. Yes, sir.

Q. Using your books, will you state what stocks were sold at that time?

Mr. COOKE.—We object to that time; if he is going to testify [331—327] from his books, we submit they ought to be before us.

Mr. THATCHER.—Wait until I finish the question.

(Testimony of David Taylor.)

Q. Have you your books here?

A. I have my ledger here.

Q. When were the items entered in the ledger?

A. They were entered in the ledger from the cash book some time after this transaction; I don't know just when they were written up, probably within two or three weeks.

Q. Who wrote them up? A. I did.

Q. Did you keep your own cash-book and your own ledger? A. I do.

Q. And have you the ledger here at the present time? A. I have.

Q. Does the ledger contain a true and accurate statement as to the sales of your securities, the amounts received therefor, and the dates when sold?

A. It does with a variation of one or two days on the dates.

Q. Why do you say with a variation of one or two days on the dates?

A. My cash-book shows the dates that the deposits of money received from the sale of stock were deposited, while the stocks may have been sold by the brokers a couple of days before and all paid at the same time; I have a telegram from the broker showing the days.

Q. Never mind the telegram; don't you know as a matter of fact they were entered in the cash-book or in the ledger? A. Yes.

Q. And before the dates which appear thereon; the dates as shown in your ledger are the dates when

(Testimony of David Taylor.)

the money was received from the sale of the stock, is that correct? A. Yes.

Q. Is this your ledger? (Hands to witness.)

A. Yes, sir.

Q. Will you turn to the page or pages from which you took the memoranda or the date which you have here, and state the number of the pages on which they occur in your ledger? [332—328]

A. On pages 2, 3, 4, 5, 7, 10, 42, 43.

Q. Using the ledger which you have will you state what dates you sold and what stocks you sold, and the amount and character of the stocks?

A. On May 16th sold five Union Pacific first mortgage bonds.

Mr. WHEELER.—One moment. We object to any evidence whatever as to any sales of any stocks or bonds made at any time after the 14th day of May, 1919, upon the ground that it appears from the evidence that any sales, or anything that was done by this witness certainly after the 14th day of May, we say earlier than that, but at any rate after the 14th day of May, was done by him after he had reached a determination to have an independent investigation of the property made before investing any funds of his own therein. Secondly, that it is not enough that it should appear that he sold some stocks or bonds, but it must appear that he suffered a personal detriment, and that detriment would not appear from the mere circumstance that he bought at one price and sold at a loss; but it would have to appear that if he had held on to the stocks and

(Testimony of David Taylor.)

bonds that he would not have suffered a loss, and that he would have held on to them but for the use that he intended to make of them.

Mr. THATCHER.—We take the position, if the Court please, that this evidence shows performance, or getting ready to perform, and that it also shows reliance upon the representations, that he did sell the stocks, that he did suffer a loss, that is, over the price which he paid for them, and we will show what that loss was. And it is our further contention that the mere fact that he may have determined to make a further investigation, or an investigation through or by an expert before finally putting his money into the loan, rather than the performance of the services, is entirely [333—329] immaterial, and that the rule of law is that a person may partially rely upon the representations, and he may partially rely upon other considerations, and when he does so it is not necessary to show that the representations were the sole inducement which caused him to act; all that is necessary is to show that they were a material or an actual inducement for him in acting or endeavoring to perform the services.

The COURT.—Well, I will admit the testimony, but I am not passing on that question as to the proof of the loss. I would like to hear from you further as to whether the proper method of proving the loss is to show the purchase price of these bonds or stocks, and the price at which he sold them; it might have been very profitable for him to have sold them at that time.

(Testimony of David Taylor.)

Mr. THATCHER.—Yes, that is true. I think we can show what the facts were, as far as that is concerned; I am not sure as to that.

Mr. WHEELER.—Permit me to say, your Honor, in response to counsel's suggestion, we do not accept his statement at all in regard to the rule of law.

(Discussion.)

Mr. WHEELER.—It seems to me we can hasten matters a little. Why not put in this memorandum?

Mr. THATCHER.—I am perfectly willing.

Mr. WHEELER.—I think the Court and counsel understand my suggestion is merely to save time; it does not admit the materiality of the evidence.

Mr. COOKE.—Has the Court disposed of the objection as to the contents of that, the purchase price and the selling price?

The COURT.—No, the purchase price I am very dubious about. As I said before, the fact that he may have bought some of this [334—330] stock for a thousand dollars and sold it for nine hundred dollars does not indicate there was any loss; subsequent facts may show it was a very profitable thing for him to do.

Mr. THATCHER.—I have prepared two exhibits, your Honor, one which shows the loss and one which does not.

The COURT.—I will make simply a *pro forma* admitting that or rejecting it, as you wish; it is in the record.

(Testimony of David Taylor.)

Mr. WHEELER.—The difficulty is, it does not show the stock quotations upon the date on which the transactions here concerned took place. The date of the filing of the complaint, for instance, it does not appear what was the condition of the stock market on that day, and on that day would he have suffered a loss or made a profit. There is nothing to indicate that on the statement.

Mr. THATCHER.—I will offer both exhibits.

Mr. WHEELER.—If that is to go in in this way, in order to save time, will you consent that the quotations as they appeared in the San Francisco or New York papers upon the respective dates since that time, right down to date, may also be looked to.

Mr. THATCHER.—Yes, we will consent that any financial paper in good standing may be used as evidence to show the quotations of the sale price or value of any stock listed here.

Mr. WHEELER.—That being consented to we will not insist upon the witness going into his books in order to make the offer that is now proposed; but we are not to be understood as admitting its materiality, relevancy or competency; we present our objection to the statement offered, and to the statement offered supplemented by the quotations counsel has consented may come in; even so, we say it is incompetent, irrelevant and immaterial.

Mr. COOKE.—There is no limitation as to time?

Mr. THATCHER.—No. [335—331]

Mr. WHEELER.—It runs right down to date.

(Testimony of David Taylor.)

Mr. THATCHER.—They may all be admitted, subject to their materiality, but not as to the foundation necessary. I withdraw the offer of both, and offer just one, which has everything the other has.

(The paper offered is marked Plaintiff's Exhibit No. 40.)

Mr. THATCHER.—(Q.) Mr. Taylor, I call your attention to a check, and ask you if you ever saw that before?

A. I did.

Q. Whose check is it? A. F. M. Taylor's.

Q. Is that the check which you referred to the other day upon your direct and cross-examination, of \$25,000 given to you by F. M. Taylor?

A. It is.

Mr. THATCHER.—We offer it in evidence, if the Court please.

Mr. WHEELER.—Objected to upon the ground it is incompetent, irrelevant and immaterial, it appearing that it was a payment made to the witness on the 28th day of May, 1919, long after he had determined upon an independent investigation, and long after he had news from his expert, Mr. Bancroft, as to what the independent investigation had resulted in.

The COURT.—The same ruling as in the others.

Mr. THATCHER.—I offer this upon the additional ground of showing exactly what the transaction was, considerable examination as to the date having taken place.

(Testimony of David Taylor.)

(Check for \$25,000 to the order of David Taylor is marked Plaintiff's Exhibit No. 41.)

Mr. THATCHER.—(Q.) Mr. Taylor, I call your attention to what purports to be a copy of a telegram addressed to Wells Fargo Nevada National Bank, of date May 27th, and ask you if you sent that to the Wells Fargo Bank at San Francisco?

A. I did.

Q. Did you receive a reply from that?

A. I did. [336—332]

Q. I call your attention to a telegram purporting to be signed by the Wells Fargo Bank, on a letter-head of the Postal Telegraph Company, and ask if you received that telegram in reply to yours of the 27th? A. I did.

Mr. THATCHER.—We offer them both in evidence as one exhibit.

Mr. WHEELER.—We make the objection that the evidence is irrelevant, immaterial and incompetent, and specifically, that the telegrams seem to have passed between the Wells Fargo Nevada National Bank and the witness on the 27th and 28th days of May, a time long subsequent to the time on which he had determined to have an independent investigation of these properties made, and after he had received the report from his engineer, Mr. Bancroft, who had made the investigation, and at a time when he was acting upon information received from Mr. Bancroft, and not on anything received from the defendants, or any or either of them.

(Testimony of David Taylor.)

Mr. THATCHER.—These telegrams are prior to the receipt of the Bancroft report.

Mr. WHEELER.—Mr. Bancroft's wire had come earlier.

Mr. THATCHER.—Mr. Bancroft's wire also came on the 27th; he had not received any assays. Mr. Bancroft's wire was that the tonnage was sufficient, but he could not definitely say until he received the assays.

The COURT.—I am rather doubtful about these, Mr. Thatcher, but I will allow them in.

Mr. THATCHER.—I offer it for the purpose of showing continued reliance up to that date on the representations made—preparation for completion of all the terms of the contract.

(Telegrams dated May 27th, and May 28th, 1919, sent to and received from Wells Fargo Nevada National Bank by David Taylor, are marked Plaintiff's Exhibit No. 42.) [337—333]

Mr. THATCHER.—We offer this in evidence as one exhibit.

Mr. WHEELER.—Object to it as irrelevant and immaterial. You need not further identify it; we agree they were sent and received respectively. Objected to as irrelevant, immaterial and incompetent, particularly that of date May 12th, the date when the letter of the witness was written; it appears to have been at a time after the witness had determined to have an independent investigation made by Mr. Bancroft, before proceeding with the transaction.

(Testimony of David Taylor.)

Mr. THATCHER.—I might state what the letters are. One is a letter to the New York Trust Company by Mr. Taylor, asking whether he can arrange to borrow \$40,000 on security; that was on May 12th; and the answer, on May 15th, to Mr. Taylor, saying that they will lend him \$40,000 for ninety days upon the security just mentioned in his letter, being scheelite concentrates.

Mr. WHEELER.—Our precise point is, after a man has determined to have independent investigation made, he may well go ahead making preparations so he will know what he can do in the event that he is satisfied; yet it is indicated there that he would not need it, if he needs it at all, for about fifteen days, showing that he was contemplating obtaining an independent report before proceeding and would not tend to show he was in any way relying upon representations made, but was merely making his preparations in anticipation of the report of his own expert.

Mr. THATCHER.—We offer it for the purpose of showing continued reliance on the representations which were made.

The COURT.—It will be admitted.

(Letter from David Taylor to New York Trust Co., dated May 12th, 1919, and letter from New York Trust Company to David Taylor, dated May 15, 1919, are marked as one exhibit, Plaintiff's No. 43.)

Mr. THATCHER.—I call your attention to—
[338—334]

(Testimony of David Taylor.)

MR. WHEELER.—We admit the fact it is a letter written by L. A. Friedman and received by the witness, and we object to it as irrelevant, immaterial and incompetent, and that if admitted for any purpose it must be confined to Mr. Friedman, but as to him we urge the objection.

MR. COOKE.—Did you state any purpose in that offer?

MR. THATCHER.—No; I want to show the representations of Mr. Friedman.

MR. COOKE.—After the contract was made.

MR. THATCHER.—It is on April 17th, after the contract was made, but it is a continued representation, a continuation of the various representations theretofore made.

MR. COOKE.—After counsel's statement we object on the ground it is not responsive to any issue in the pleading; that it is after the contract was entered into, therefore could not induce him to make any contract, and in any event, the representations in the letter are not representations of any fact upon which the plaintiff could have placed any reliance whatsoever.

MR. WHEELER.—Mr. Friedman says, your Honor, in that letter of April 17th, that the mine was looking bigger and better all the time; there is no issue in the case touching any representations alleged to have been made after April 17th, and certainly the representation made at that time is not responsive to any issue presented, and for

(Testimony of David Taylor.)

that reason, it seems to me it is entirely irrelevant and immaterial.

The COURT.—I don't see how you can claim that the contract was made in reliance upon that letter. The fact that the mine was looking bigger and better every day might be absolutely true, and still your case be good or bad.

Mr. THATCHER.—Your Honor is perfectly correct, on that, but [339—335] there is a line of authorities holding that in false representation cases, having shown those which were relied upon, you may show others of like character, and even show that they were made to other persons. A decision by Judge Hook of the Circuit Court of Appeals so holds.

The COURT.—I will allow that testimony to go in, but it will go out if you don't convince me that that is correct law, because my opinion is against you on that point.

Mr. THATCHER.—If I don't convince your Honor, it may go out.

(Letter dated April 17, 1919, to David Taylor from L. A. Friedman is marked Plaintiff's Exhibit No. 44.)

Mr. THATCHER.—You may cross-examine.

Cross-examination.

Mr. WHEELER.—(Q.) On page 7 of your sworn complaint, among other things you say, that the defendants Poole, Murrish and Nenzel with the intent to deceive the plaintiff, represented to the

(Testimony of David Taylor.)

plaintiff that on the 2d day of April there was blocked out, in sight and ready for mining and reduction into concentrates over 60,000 tons of scheelite ore. On what day did they represent to you, or did any or either of them represent or say to you, that over 60,000 tons of scheelite ore was in sight and ready for mining and reduction into concentrates?

Mr. THATCHER.—Objected to as not cross-examination, and as already having been testified to.

The COURT.—I will allow the question. It is not strictly cross-examination, but there has been not continuous cross-examination or direct examination, either.

A. It was the Monday following their arrival in Denver, whether the exact words that you have read there are the words used—the statement was [340—336] that ore was developed and blocked out; now whether in sight was included, I could not tell you.

Mr. WHEELER.—(Q.) Did not testify heretofore on your cross-examination that you could not say whether they used the words blocked out, or the word developed?

A. I don't know, sir; I have not seen a copy of my record on cross-examination.

Q. If you did say that the word that was used might not have been blocked out, or in substance so state, was it true or false?

A. What was that, please?

(Testimony of David Taylor.)

(The reporter reads the question.)

A. I don't understand your question.

Q. I will reframe it. If on your cross-examination you have said that you could not recall whether or not the word that was used was blocked out, was your statement on cross-examination true or false?

A. Will you give me that once more, sir.

Mr. THATCHER.—I think, if the Court please, that that is not a proper question, or form of question to ask a witness.

Mr. WHEELER.—I think counsel is right, your Honor.

Q. Did they use the exact words "blocked out"?

A. Whether it was blocked out or developed—I am not sure whether it was blocked out or developed.

Q. Why when you filed this complaint did you make the sworn allegation that they said that it was in sight?

Mr. THATCHER.—Object on the ground this witness did not swear to this complaint.

Mr. WHEELER.—I submit it is entirely proper.

Mr. COOKE.—He swore to it, and subsequently filed an affidavit.

Mr. THATCHER.—I verified this complaint; he filed an affidavit subsequently. [341—337]

Mr. WHEELER.—(Q.) There is on file here an affidavit that the statements contained in this complaint are true; I *will* your attention to that, Mr. Witness.

(Testimony of David Taylor.)

The COURT.—He may answer the question.

Mr. WHEELER.—(Q.) Why did you make an affidavit that they said that the ore was in sight?

Mr. THATCHER.—I object to the question on the ground if it is for the purpose of impeachment, of having made another or different declaration, or sworn to one, the witness is entitled to have the exact words.

Mr. WHEELER.—I am giving the exact words.

Mr. THATCHER.—Your statement was that he had sworn to the complaint.

Mr. COOKE.—He swore to an affidavit, stating that the allegations of the complaint were known to be true.

Mr. WHEELER.—I will put it in this form: (Q.) Why did you say in an affidavit that the statement in your complaint that the representation to you was that there was in sight over 60,000 tons of ore?

A. I don't see the difference, and I don't know the difference now between in sight, developed or blocked out, which words were used.

Q. You do not now know which words were used, one or the other was used?

A. I said that "in sight" was not, I don't remember "in sight." I said to your question just now I didn't know what the difference would be from a technical standpoint of ore in sight developed or ore blocked out.

Q. So when you stated in your affidavit that they

(Testimony of David Taylor.)

had represented to you the ore was in sight, you really didn't mean to say they had made that representation? A. No, sir.

Q. Or that they had used those words?
[342—338]

A. They used the words in sight, blocked out, or developed, some of them, I don't see the difference.

Q. I understand you don't see the difference, but I am trying to get from you which words were used, whether you see the difference or not.

A. Blocked out or developed, I don't remember the words in sight having been used, they may have been.

Q. Why did you say in your affidavit that they said that that ore was in sight, if they didn't use that phrase?

A. It seems to me the term in sight is equivalent to blocked out or developed.

Q. At any rate, you understood when you made your affidavit, and you now understand, that those words were the equivalent, each of the other, is that right? A. Yes.

Q. Nothing has occurred which has led you to believe that there is a difference between the words in sight, developed and blocked out?

A. I don't know whether there is from an engineering standpoint or not; there is nothing from my standpoint; I could not answer which was which.

Q. As a matter of fact, you didn't take them to mean anything more or different, as you under-

(Testimony of David Taylor.)

stood the phrases, than that there was that quantity of ore in sight? A. No.

Mr. WHEELER.—That is all.

Mr. THATCHER.—That is all.

Mr. COOKE.—(Q.) This \$25,000 check, Mr. Taylor, you have testified regarding, that you received from your father; was there any other business transaction of any kind embraced in that check, aside from this subscription? A. No, sir.

Q. By that you mean that the entire \$25,000 was to be wholly devoted to this subscription arrangement to which you have heretofore testified?

A. Yes, sir.

Mr. THATCHER.—Is that all?

Mr. COOKE.—Yes. [343—339]

Mr. THATCHER.—Will counsel admit the making and execution of the Loring contract, the contract between the corporations and Mr. Loring, a copy of which is attached to your answers?

Mr. COOKE.—We do.

Mr. WHEELER.—Well, we set forth in our answer that the contract was made, and set it forth as an exhibit; it does not call for any further admission.

Mr. COOKE.—Counsel can have it as far as we are concerned.

Mr. DAVIS.—There is a clerical error in the copy of the mortgage attached.

Mr. WHEELER.—While counsel are looking for that I would like to call the Court's attention to the fact that the contract with Mr. Loring is a

(Testimony of David Taylor.)

contract for the purchase of properties of the several corporations, not for the purchase of stock; and that it appears therefrom that Mr. Loring obligated himself to pay \$333,333.33 for these properties. It also appears that the times of payment were such that by this time there must have been paid a sum in excess of \$258,000 on account; and also that at the time this suit was brought there had already been paid \$233,000 and upwards, on account; also that the first payment under that contract, as called for, was, as I remember it now, the first day of September, 1919. That is a matter of consequence upon the question of laches in instituting this suit, coming in at a late period, not until the defendant had changed his position materially, and paid a very large sum into the corporation, after the plaintiff must have known that contract was outstanding, and that by its terms it would be forfeited unless Mr. Loring made the payments.

Mr. DAVIS.—The clerical error to which I wish to call the Court's attention, so it may be corrected, is on page 3 of Exhibit 5 of defendant Loring's answer: The statements of the items of [344—340] the mortgage; The first four of \$50,000 each; the next, on line 28, should be \$33,333, and the next four \$25,000 each.

Mr. THATCHER.—I will ask Mr. Taylor one more question.

The COURT.—Is that to be admitted?

Mr. THATCHER.—The correction?

(Testimony of David Taylor.)

The COURT.—Yes.

Mr. THATCHER.—Why, I presume so, if the Court please.

The COURT.—It conforms to the documents attached to the statement presented on the first hearing, Mr. Loring's affidavit?

Mr. WHEELER.—That the document as now amended does conform?

The COURT.—Yes.

Mr. WHEELER.—Yes; I think it was a clerical error in making copies. What did counsel wish. These agreements are set forth in our answer, and it seems to me he requires no admission as to that.

Mr. THATCHER.—They are part of your separate defense, and unless some admission is made in regard to them, I think it would be necessary to have some proof. All I want is to have it admitted that the copies which are there may become a part of the record, as showing the transactions between the company and Mr. Loring.

Mr. WHEELER.—We admit the documents to be genuine and duly executed. I don't know what Mr. Cooke wishes.

Mr. COOKE.—We have pleaded it, and I am certainly willing to admit it.

Mr. THATCHER.—(Q.) Mr. Taylor, I call your attention to an envelope and to a letter and notice in the inside of it; did you receive that in due course of mail? A. I did.

(Testimony of David Taylor.)

Q. Was the notice in the envelope? A. Yes.

Mr. THATCHER.—This is the notice of the meeting of the stockholders, and the envelope which went with it. [345—341]

Mr. WHEELER.—Objected to as irrevelant, immaterial and incompetent, particularly as to the defendant Loring.

Mr. THATCHER.—We offer it, if the Court please, upon the ground that it shows the notice given of the meeting of the stockholders of the Nevada Humboldt Tungsten Mines Company, and the date when mailed and given to stockholders; and we will hereafter show to your Honor that a contract made with Mr. Loring was made at those meetings, and that it was made after giving only seven days' notice of a stockholders' meeting, which does not comply with the statute of Nevada relative to the sale of all of the assets of a corporation.

The COURT.—Has he answered with reference to this, to show that this notice was given?

Mr. THATCHER.—I don't know what their answer on that is. Mr. Taylor has, he said that he received it. I am going to put another witness on the stand just a moment. I am through with Mr. Taylor unless you want to ask some questions.

The COURT.—It may go in, showing that is the notice that Mr. Taylor received.

(The envelope, with notice dated Lovelock, Nevada, August 16, 1919, is marked Plaintiff's Exhibit No. 45.) [346—342]

Testimony of Rudolph Nenzel, for Plaintiff.

Mr. RUDOLPH NENZEL, one of the defendants, called as a witness by plaintiff, after being sworn, testified as follows:

Direct Examination by Mr. THATCHER.

Q. I show you Plaintiff's Exhibit 45, Mr. Nenzel, an envelope and paper, and ask you if you ever saw those before? A. Yes, sir.

Q. Are those the notices that were sent out of a meeting of the Nevada Humboldt Tungsten Mines Company? A. Yes, sir.

Q. Were they sent out on the day on which that notice is dated? A. I believe so.

Q. Take a look at the envelope; did you ever see the envelope before? A. Yes, sir.

Q. Do you notice the postmark as to when it was mailed? A. Yes.

Q. Does that assist you in ascertaining when it was mailed? A. No, sir, it does not.

Q. They were not sent out before that, were they?

A. I have an affidavit as to when that was mailed, which would refresh my recollection.

Mr. THATCHER.—I move to strike out the last part of the answer of the witness on the ground it is not responsive. I asked him if that refreshed his memory, and he said no.

The COURT.—It may go out.

Mr. THATCHER.—(Q.) I call your attention to

(Testimony of Rudolph Nenzel.)

some papers, and ask you if you ever saw those before? A. Yes, sir.

Q. Calling your attention to page one, I ask you what that is? A. Waiver of notice.

Q. Is that a copy?

A. That is a copy, yes, sir.

Q. Are those copies of proceedings of the Nevada Humboldt Tungsten [347—343] Mines Company meetings of the corporation, and its stockholders and directors? A. Yes, sir.

Q. Look through all of the pages and tell us what it is for sure.

A. That is the minutes of the special meeting of the board of directors of the Nevada Humboldt Tungsten Mines Company, held at Lovelock, Nevada, August 16th, 1919.

Q. Will you number the pages there?

Mr. WHEELER.—What is that?

Mr. THATCHER.—This is a copy which was furnished to me by Mr. French; that is how I got it; he handed it to me after the meeting was held.

Mr. WHEELER.—We might check it up against the books.

Mr. THATCHER.—Suppose you check it up against the books, and we will offer it in evidence; that is all I want to prove.

Mr. WHEELER.—Subject to our right to check them up and be satisfied they are correct, and if incorrect, and with the consent of the Court, to change it so it will be correct.

The COURT.—Subject to your reservation to check it up the paper will be admitted.

(Minutes of special meeting of the Board of Directors of the Nevada Humboldt Tungsten Mines Company is marked Plaintiff's Exhibit No. 46.)

(A short recess is taken at this time.)

Mr. THATCHER.—If the Court please, I am through, except I want to offer those exhibits which were marked for identification. They are Exhibits 4 and 7, and there were a number of letters connecting Mr. Poole as engineer of the corporation, or acting in that capacity, and being so recognized by the defendants; they were offered and marked for identification.

Mr. WHEELER.—We made our objection at that time, if not, we [348—344] object as irrelevant, immaterial and incompetent, not shown to have been authorized by any person concerned, and not tending to prove the issues to which counsel says they are addressed; that some of them are obviously self-serving, and that under no circumstances would they be evidence save as against the persons writing them, and in any event they must be confined to such persons.

The COURT.—Those letters were written by various defendants?

Mr. THATCHER.—Yes.

Mr. COOKE.—Can you refer to the particular letters for identification?

Mr. THATCHER.—*Plaintiff's* for identification

36; I will withdraw that. Now these letters are already marked, and I will withdraw two of these; those to Mr. Pettigrew, signed by Mr. Murrish and signed by Mr. Nenzel, and I will offer in evidence a letter of January 19th, from Mr. Friedman to Mr. Taylor, in which he says: "Mr. Bancroft is at the mine and has called up here at the office regarding some work, as Mr. Poole has unavoidably been delayed on account of the litigation at Rochester, and he talked the matter over with Mr. Bancroft by 'phone and he will be at the mine to-morrow, but Mr. Bancroft had expected him there to-day, but unfortunately it will be impossible for him to arrive there until to-morrow and I am sure that they will outline such a course of development work as will be entirely satisfactory to all parties concerned, and I sincerely hope that the mine will turn out even bigger than we expected and that you will make a profit on your deal which will be far beyond your most sanguine expectations." One of the purposes in offering the letter is to show the connection of Mr. Poole with the mine as an engineer, and that it was recognized by Mr. Friedman as one of the defendants.

Mr. WHEELER.—Objected to as irrelevant, immaterial and incompetent, [349—345] not tending to prove any issue in the case.

The COURT.—That was more than two months and a half before the contract was entered into?

Mr. THATCHER.—That is true, if the Court please, but where there are a series of statements

and representations, all reasonably connected, following along within a reasonable period, I take it that they may all be used, and that they are not too remote to be a part of the case.

Mr. COOKE.—We submit it does not show anything affirmatively or definitely, any connection with the property that counsel speaks of.

(Discussion.)

The COURT.—I will sustain the objection.

Mr. THATCHER.—I would like to have it marked the next number in order, showing it was rejected, and I will take an exception.

(Letter dated January 19th, 1919, from L. A. Friedman to Captain David Taylor, is marked Plaintiff's Exhibit No. 47, rejected.)

Mr. THATCHER.—If the Court please, the second letter, which is a part of Exhibit 35 for identification, is for the same purpose; the date is April 9th; "Mr. Poole left for Tungsten to-day and probably will be there for a day or two and when he returns he no doubt will write you fully regarding conditions." That is signed by Mr. Nenzel.

Mr. COOKE.—We make the same objections to that as was made to the one from Mr. Friedman to Mr. Taylor, dated January 19th, in respect to its not being proof that the defendant Poole did have any peculiar knowledge of the matters and things set up in the complaint. It does not show that he had any such connection with the property as would afford him any such knowledge; does not show that he had any connection with the property at all; except he is going out there and stay for a day or

two, and no doubt will write [350—346] Mr. Taylor fully regarding conditions. That is Mr. Nenzel's statement; and I don't see how they can prove Poole was engineer of the property, or that he had any knowledge of it by such very general statements as that.

Mr. THATCHER.—Well, it merely shows that they relied upon Mr. Poole when it came to a question of the mine, and the mine conditions.

The COURT.—Well, I will let it go in, Mr. Thatcher.

(Letter dated April 9th, 1919, from R. Nenzel to Captain David Taylor, marked Plaintiff's Exhibit No. 35, for identification, is admitted and marked Plaintiff's Exhibit No. 35.)

Mr. THATCHER.—I think that is all, if the Court please. We rest. [351—347]

In the District Court of the United States, in and
for the District of Nevada.

Honorable E. S. FARRINGTON, Judge.

B-7.

DAVID TAYLOR,

Plaintiff,

vs.

NEVADA HUMBOLDT TUNGSTEN MINES
COMPANY, a Corporation, et al.,
Defendants.

Statement of the Evidence.

VOLUME 2.

APPEARANCES:

Mr. GEORGE B. THATCHER, for Plaintiff.

Mr. H. R. COOKE, for Defendants Nevada Humboldt Tungsten Mines Company, et al.

Mr. JOHN. F. DAVIS and Mr. CHARLES R. WHEELER, for Defendant W. J. Loring.

Lodged in clerk's office Feb. 18, 1922. E. O. Patterson, Clerk. By O. E. Benham, Deputy.

Settled and filed June 9, 1922. E. O. Patterson, Clerk.

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Testimony of C. W. Poole, for Defendants.

C. W. POOLE, one of the defendants, called as a witness, after being sworn, testified as follows:

Direct Examination by Mr. WHEELER.

Q. What is your name? A. C. W. Poole.

Q. Where do you reside?

A. Lovelock, Nevada.

Q. What is your occupation? A. Mining.

Q. How long has that been your occupation?

A. Continuously since 1904, with the exception of three months.

Q. Of what institution of learning are you a graduate? A. University of Pennsylvania.

Q. What year? A. 1904.

Q. Graduated in 1904; have you had a professional course, or experience in any other institution of learning? A. No.

Q. What was your occupation throughout the year 1919? A. Mining.

Q. Where? A. With the Rochester Mines.

Q. In Nevada? A. Yes.

Q. What kind of mine is that?

A. Not the entire period of 1919.

Q. I understand. Well then, let us take the month of January, and up to the 2d day of April?

A. I was with the Rochester Mines Company.

Q. What kind of a mine is that?

A. That is a silver and gold mine.

Q. Where is it situated with reference to the location of the properties owned by the Nevada Tungsten Mines Company?

(Testimony of C. W. Poole.)

A. It is some fifty miles south of there by the road, about thirty miles air line.

Q. Do you recall taking a trip to Denver in the latter part of [353—348] March, 1919?

A. Yes.

Q. Who went with you?

A. Mr. Nenzel and Mr. Murrish.

Q. You have been present in the courtroom, I take it, while certain letters were offered in evidence, among them being a letter in which a request by the plaintiff Taylor is made that Mr. Poole, Mr. Murrish and Mr. Nenzel be sent on to Denver, as he could not come out to make an examination of the property as requested by Mr. Friedman, could not come out with Mr. Bancroft to make an examination of the property; do you recall that correspondence?

Mr. THATCHER.—I object to that as not within the evidence shown.

Mr. COOKE.—In what respect?

Mr. WHEELER.—If there is any dispute about that the best evidence would be the record. I think you will not disagree with me Counsel, if I put it this way: That Mr. Friedman on the 27th day of March sent a telegram requesting that Mr. Poole and Mr. Bancroft come out and visit the property, and expressing the hope that they would find the mine up to their expectations; that there is in evidence an answer from Mr. Taylor, saying that he cannot come, that Mr. Bancroft is away, and that he himself is going to be engaged until about the 10th

(Testimony of C. W. Poole.)

of April, and suggesting that the stockholders might send on Mr. Poole, Mr. Murrish and Mr. Nenzel. Those are the matters embraced in my question.

Mr. THATCHER.—I object on the further ground it is leading; I don't want counsel to testify; I prefer that the witness tell the facts.

Mr. WHEELER.—My understanding of counsel's objection was that it was not in accordance with the fact.

Mr. THATCHER.—I made both objections.

(By direction the reporter reads the question.)
[354—349]

Mr. THATCHER.—I object to the question as leading.

The COURT.—I will overrule the objection.

Mr. WHEELER.—(Q.) Answer that, sir?

A. I do.

Q. State whether or not it was in response to Mr. Taylor's request that you, Mr. Murrish and Mr. Nenzel went on to Denver in the latter part of March, 1919? A. Yes.

Q. After arriving in Denver, did you see the plaintiff Taylor? A. I did.

Q. On what date?

A. The first time I saw him was a few hours after our arrival on Sunday, probably an hour after we arrived.

Q. Sunday what date?

A. March 30th, as I recall.

Q. Sunday, March the 30th; did you or not see him again on Monday, March 31st?

(Testimony of C. W. Poole.)

A. I did see him.

Q. I hand you Plaintiff's Exhibit 15, and ask you if a document or one substantially similar was exhibited to you on Sunday, March 30, 1919, by Mr. Taylor; look it over, please, and examine the exhibits thereunto attached, but first confine your answer to the typewritten portion?

A. That seems to be the same report.

Q. That is, the typewritten portion thereof?

A. Yes, sir.

Q. Now please examine the plates thereon, and state whether or not each of those plates appears to be the plate and in the same condition that it was at the time the report was shown to you?

A. Some of the plates have been changed.

Q. I have difficulty in hearing you, and I know they can't hear you further away, so please bear it in mind and be very clear in your answers. What plates are the same, and what, if any, are not the same, as when exhibited to you?

A. Plate one is the same; plate 2 is the same; plate 3 is the same; plate 4 is the same; plate 5 is changed; plate 6 is changed; this appendix 11-A is the same.

Q. You say that plate 5 is changed? In what way does plate 5 [355—350] differ now from its appearance at the time that it was shown to you on Sunday, March 30, 1919.

A. There are certain lead pencil additions to plate 5 that were not there.

Q. Were any of the pencil marks or lines

(Testimony of C. W. Poole.)

now appearing upon plate 5 there on the first occasion that you saw that plate, on Sunday, March 30, 1919? A. No.

Q. Do you know when they were placed there?

A. No.

Q. Do you know by whom they were placed there, as a matter of your knowledge? A. No.

Q. Did you see them placed there? A. No.

Q. Were you present on any occasion when they were placed there? A. No.

Q. Did the plaintiff Taylor on Sunday, March 30, 1919, ask you to plot on plate 5, or on any other plate or plates, recent developments at the mine, or developments since Bancroft's report had been made? A. No.

Q. You spoke of changes in plate 6, what changes have been made in plate 6 since you saw the same on the 30th day of May, 1919?

A. This pencil mark here (indicating).

Q. You are now pointing to certain dotted lines in the lower left-hand corner of the sheet, plate 6?

A. Yes, sir.

Q. Are those the only lines or changes that have been made since that time?

A. Well, this pencil mark here, this dashed one.

Q. You are pointing now to a line in the upper right-hand corner? A. Yes.

Q. Consisting of dashes? A. Yes.

Q. Do you know who made those changes upon that map? A. I do not.

Q. Did you see them made? A. I did not.

(Testimony of C. W. Poole.)

Q. Were you present on any occasion when they were made? A. No.

Q. Do you know positively that this is the precise document shown to you on that date, or are you to be understood as saying that [356—351] this is a duplicate, if not the precise document, of the documents shown on that date?

Mr. THATCHER.—Objected to as leading.

The COURT.—I will allow the question.

WITNESS.—Do I know that is the precise document?

Mr. WHEELER.—(Q.) Yes. A. I do not.

Q. Then apart from the additions of the lines and figures mentioned by you, you are not certain that this is the precise document, but you are certain that it is a duplicate of the document with those exceptions; is that what you intend to be understood as saying?

Mr. THATCHER.—We submit it is leading, if the Court please.

Mr. WHEELER.—There is no question about its being leading.

Q. Well, as a matter of fact, if this is not the original document is it the same, or substantially the same, as the document shown to you, with the exception of the pencil figures and lines?

A. It is.

Q. Were you present in the office of Mr. Taylor in Denver on the morning of Monday, the 31st day of March, 1919? A. I was.

Q. Were Mr. Nenzel and Mr. Murrish present

(Testimony of C. W. Poole.)

throughout the interview with Mr. Taylor on that occasion? A. They were.

Q. Was Mr. Murrish there all of the time, or only a portion of the time?

A. He was there all the time.

Q. Was Mr. Nenzel there all the time, or only a portion of the time?

A. He was there all the time.

Q. On Monday morning, May 31st, did Mr. Taylor in the presence of Mr. Nenzel and Mr. Murrish, or in the presence of either of them, or in your presence alone, ask you if you had put on the original Bancroft report, memoranda showing the additional tonnage of ore with its values, that had been blocked out since Bancroft's report?

A. No. [357—352]

Q. Did he ask you any such question, either in substance or effect, on that occasion?

A. He did not.

Q. Did you on that occasion state to Mr. Taylor that you had not had an opportunity to do that, that is, to put on the original Bancroft report memoranda showing the additional tonnage of ore with its values, that had been blocked out since the Bancroft report was made? A. I did not.

Q. Did Mr. Taylor on that occasion say to you, "Well, let's get the figures down now," and did you thereupon give or state or indicate to Mr. Taylor the lines and the figures, or either of them, giving tonnages and assay values, widths of ore, and did Mr. Taylor put them down on the map at that time?

(Testimony of C. W. Poole.)

A. He did not.

Q. Was any line or figure or memoranda, giving tonnages and assay values, or width of ore, or any other memoranda put down by Mr. Tayler on the map, plate 5, annexed to Exhibit 15, or on any other map, on Monday, the 31st day of March, 1919, in your presence? A. There was not.

Q. Were any lines representing the limits of the or any ore bodies in the property belonging to the defendant Nevada Tungsten Mines Company, together with figures which you claimed of commercial ore as shown by those lines, placed upon any map in your presence by Mr. Taylor on that occasion? A. No.

Q. When is ore said by men in your profession to be blocked out?

Mr. THATCHER.—Is he testifying as a mining engineer? He said mining; I don't believe he has testified that he is qualified. Of course we would merely like to know what his qualifications are.

Mr. WHEELER.—I think I have shown he is a graduate of a well known educational institution of this country.

Mr. THATCHER.—I didn't understand that he graduated from the mining department of that institution. [358—353]

Q. What is the fact?

A. I graduated as a bachelor of science, and majored in metallurgy and geology.

The COURT.—He may answer the question, if he knows.

(Testimony of C. W. Poole.)

WITNESS.—What is the question?

Mr. WHEELER.—The meaning of the phrase blocked out, referring to ore in mines.

A. Ore that has been developed on four sides.

Q. Is ore that is developed on two sides or three sides, and not on four sides, said to be blocked out?

A. No.

Q. Did you on Monday, March 31st, on the occasion referred to in previous questions, say to Mr. Taylor that a certain area in the property of the Nevada Tungsten Mines Company was blocked out, and did he ask you to put it down on the map, and to show where it was? A. No.

Q. Is it true or untrue that all of the pencil memoranda appearing upon plate 5, were placed upon plate 5 annexed to Plaintiff's Exhibit 15, in your presence while you were reading the figures to Mr. Taylor and standing over his chair most of the time while he was putting them down?

Mr. THATCHER.—Objected to as leading, and I further object to the form of the question, asking him whether true or untrue; the witness can state the facts, and testify whether he did or did not.

Mr. WHEELER.—I have no objection to recasting the question if counsel desires me to.

Q. Were all of the pencil lines, all of the pencil memoranda, or any or either of such lines or memoranda that appear upon plate 5, annexed to Plaintiff's Exhibit 15, placed by Mr. Taylor there in your presence?

A. No, they were not placed there in my presence.

(Testimony of C. W. Poole.)

Q. Did you on that occasion read to Mr. Taylor the figures to put down, or did you stand over his chair most of the time while he was putting them down, telling him the figures?

A. No. [359—354]

Q. Did you stand over his chair and tell him any figure or line to put down upon that plate at any time on Monday, the 31st day of March, 1919?

A. I did not.

Q. Was that paper in its present form made in your presence? A. No.

Q. Was any part of it made in your presence at any time? A. No.

Q. Either on that day or any other day?

A. No.

Q. Did you tell Mr. Taylor either on that day or on any other day that you had not had an opportunity to put the lines and figures upon that plate 5 annexed to Plaintiff's Exhibit 15? A. I did not.

Q. Did you on Monday, March 31st, at any time that any of the figures were placed upon plate 5, annexed to Plaintiff's Exhibit 15, or at any time during that same day, after any notes or figures or lines were placed thereon, either in the presence of Mr. Nenzel and Mr. Murrish, or either of them, state to Mr. Taylor that there was over 60,000 tons of ore developed within the blocks indicated by the lines on plate 5, said Exhibit 15? that is, by the pencil lines shown on the map? A. No.

Q. Did you make any similar statement to him on Monday, March 31, 1919?

(Testimony of C. W. Poole.)

A. Any similar statement?

Q. Yes, on Monday, March 31st, that there were over 60,000 tons of ore developed within the blocks indicated within these lines, by the pencil lines shown on the map? A. No.

Q. Did you on that occasion, any time on that day, either in the presence of those gentlemen, or either of them, or otherwise, on that day say to him that there were over 60,000 tons of ore developed within the blocks indicated by the pencil lines shown on the map, plate 5, annexed to Plaintiff's Exhibit 15, which would average over 1.75 tungstic acid? [360—355] A. I did not.

Q. Did you on that day or date make any similar statement to Mr. Taylor? A. I did not.

Q. Did you on that day and date, in substance or effect, make to him any part or portion of that statement? A. I did not.

Q. Did you say that there was 60,000 tons altogether, including the original amount blocked out, or original amount represented by Mr. Bancroft, or appearing on the map? A. I did not.

Q. Did you on that occasion state to him that these blocks which have the pencil memoranda on, referring to plate 5, Plaintiff's Exhibit 15, and those which are within the pencil lines, had blocked out 60,000 tons? A. I did not.

Q. Did you make any such résumé on that day, after these figures appearing on plate 5, Plaintiff's Exhibit 15, had been put down?

A. You say after the résumé?

(Testimony of C. W. Poole.)

Q. Did you make any such résumé as to the tonnage in the mine? A. No.

Q. After these figures on plate 5, or any other figures, had been put down on this map, or any other map, on Monday, the 31st day of March, 1919?

A. No.

Q. How long had you known Mr. Taylor on Monday, the 31st day of March, 1919?

A. I had met Mr. Taylor for the first time very early in January of the same year.

Q. Where had you seen him?

A. In San Francisco.

Q. For how long a time had you seen him?

A. I saw him off and on for the period of a week at intervals, not off and on for the period of a week.

Q. Was that on the occasion of the discussion of the terms of the proposed option which he subsequently took in January, 1919? A. Yes.

Q. Seeing him off and on during that period, did you see him in [361—356] the presence of other people always, or were you alone together?

A. I don't recall ever having been alone with him.

Q. What was the nature of your relations at that time, strictly business relations, or social and business? A. Strictly business.

Q. How many hours altogether did you see him at that time?

A. I would say ten to twenty hours; I could not recall.

Q. And that was spent in discussing various phases of the proposed option? A. Yes.

(Testimony of C. W. Poole.)

Q. And that was all in January, 1919?

A. Yes.

Q. When next did you see him after January, 1919, in San Francisco?

A. I saw him next in Denver on Sunday, March the 30th.

Q. In the meantime you had personal correspondence with him?

A. I had had occasion to write him once, I think, and wire him once, that was all.

Q. Have you the correspondence that passed between you by wire or otherwise during that period?

A. I think so, yes.

Q. At the noon hour I will ask you to produce it for my inspection, please. A. Yes.

Q. Then apart from one or two letters referred to and the telegrams passing between you, you had had no other relations with him prior to March 30, 1919, than those you have already testified to?

A. None whatever.

(At 12 o'clock a recess is taken until 1:30 P. M.)

AFTER RECESS—1:30 P. M.

Direct Examination of C. W. POOLE resumed.

Mr. WHEELER.—(Q.) Mr. Poole, before recess you mentioned the letter or telegram which had passed between you and Mr. Taylor intermediate to your first acquaintance with him in January, 1919, and the 30th day of March, 1919; examine the letter which I present [362—357] to you, also the

(Testimony of C. W. Poole.)

telegram, and state whether or not they are the documents referred to by you, or rather copies of them. A. They are.

Mr. WHEELER.—We offer them in evidence for the purpose of showing the relation of the parties.

Mr. THATCHER.—No objection to the telegram.

Mr. WHEELER.—The telegram is offered and becomes our Exhibit “W.”

(Telegram from C. W. Poole to David Taylor, dated January 21, 1919, is marked Defendants’ Exhibit “W.”)

Mr. THATCHER.—I have no objection to this letter, being a copy of one which I offered in evidence, to which counsel objected.

(Letter from C. W. Poole to David Taylor, dated January 24, 1919, is marked Defendants’ Exhibit “X.”)

(Defendants’ Exhibits “W” and “X” are read by counsel.)

Mr. WHEELER.—I will say to your Honor the purpose of showing this fully, the relations of the parties, is to rebut any suggestions contained in the evidence that confidential relations existed as between the witness and Mr. Taylor.

Q. Were there any other letters or telegrams that you can now recall that passed between you and Mr. Taylor at any time subsequent to your meeting in January, and this meeting in Denver on the 30th day of March, 1919?

A. None that I recall; I think there are none.

Q. Did you at any time say to Mr. Taylor that the

(Testimony of C. W. Poole.)

figures upon the map, plate 5, being a part of Plaintiff's Exhibit 15, represented the state of the tonnage of commercial ore represented within the lines upon the map? A. I did not.

Q. Did you state to him on that occasion, or ever, that the figures 42728 appearing upon plate 5, so often referred to in your examination, [363—358] represented the tonnage of commercial ore existing between the lines drawn on that map from the bottom of a shaft to a point on level number 2, or any other part or portion of that map?

A. I don't believe I understand that question.

(The reporter reads the question.)

A. I did not.

Q. Did you ever make to him any representation or statement at any time that there were 42728 tons of ore represented upon the map, plate 5?

A. No.

Q. Did you say at any time that the ore within the angle formed by the pencil lines drawn from the pencil lines indicating the bottom of the shaft, was an area in which there was 60,000 tons of ore?

A. No.

Q. Or 42,728 tons of ore? A. No.

Q. Did you state or represent to Mr. Taylor on that occasion, or ever, that there were 9250 tons in the block in the extreme southwestern corner of the map, being plate 5? A. No.

Q. Or in block "M" upon said plat? A. No.

Q. Did you say to him or state or represent to him on that occasion, or ever, that in block "N"

(Testimony of C. W. Poole.)

appearing upon that plat there was contained 4200 tons of ore, or any other number of tons? A. No.

Q. Did you ever say to Mr. Taylor in substance or effect, that you knew definitely from the data upon the said plat or plate 5, or upon any map, that there was 60,000 tons of ore, or any other number of tons, in any other portion of the mine?

A. I would like to hear that question again.

(The reporter reads the question.)

A. I did not.

Q. Did you on the 31st day of March, 1919, say to Mr. Taylor that the ore within the area marked "M" upon that plate 5, averaged on the surface outcrop two per cent from any point to any other [364—359] point, or that it averaged three-quarters of a per cent at any place or point?

A. I did not.

Q. Did you calculate on that day or at any other time, or give to him the figures 4200 tons, or any other figures, as representing the quantity of ore included within the limits of the lines appearing upon plate 5? A. I did not.

Mr. THATCHER.—You are referring now to block "N"?

Mr. WHEELER.—To block "M."

Mr. THATCHER.—Well, block "M" is marked 9250; block "N" is 4200; the question was directed toward 4200, and I don't know whether you had it "M" or "N."

Mr. WHEELER.—I had "M," and asked the question in that form because the record reads thus

(Testimony of C. W. Poole.)

at page 86: "And so you understood Mr. Poole as telling you that he knew definitely from the data upon this map that there was that amount of ore in that portion of the mine?"

The COURT.—That is in "M"?

Mr. WHEELER.—In "M."

A. Yes, sir.

Q. And you supposed that it was possible for a man to know definitely with working no greater in extent that there represented on the map?

A. Mr. Poole stated to me that the entire surface outcrop averaged 2 per cent from that point to that point; he stated that that averaged three-quarters of a per cent; he calculated or gave me the figures as being included within those limits." That is the whole thing, and it seems to refer to "M," but in order to catch it both ways I asked my question, if you will look at it, in such form that it covered not only the 4000 odd tons, but also the 9000 tons. Shall I have the question read?

Mr. THATCHER.—No.

Mr. WHEELER.—(Q.) Did you state to Mr. Taylor on that occasion [365—360] on the 31st day of March, or on any other occasion or day, that there was 60,000 tons of ore blocked out or developed in that mine? A. I did not.

Q. Did you say to him on that occasion, or on any occasion, that there was 60,000 tons of ore in sight?

A. I did not.

Q. Did you ever say to Mr. Taylor, positively or otherwise, that there was over 60,000 tons of ore

(Testimony of C. W. Poole.)

developed in the mine which would average 1.75 per cent tungstic acid? A. I did not.

Q. Did you make such a statement, in substance or effect, either positively, or as a matter of opinion? A. I did not.

Q. Neither as an opinion nor otherwise?

A. No.

Q. Did you in substance or effect in talking to Mr. Taylor on that 31st day of March, or on any other day, say "There are 60,000 tons of ore that will average over 1.75 per cent developed in the mine"? A. No.

Q. Did you ever say to him that 60,000 tons of ore, or any other sum, was blocked out?

A. I never did.

Q. Did you say that it was proven in the mine that there were 60,000 tons? A. I did not.

Q. Did you tell him that he could count upon that tonnage as being there definitely? A. I did not.

Q. Did you, pointing to the map, plate 5, as the same now appears, say to him in substance or effect, this block of ore, pointing to the map, is developed on four, this on three sides, and this on two sides?

A. No.

Q. Mr. Poole, you have spoken thus far specifically of a meeting on Sunday, the 30th day of March, of a meeting on Monday, and you have made certain statements generally as to your meetings and conversations with Mr. Taylor; did you meet again on Tuesday, the 1st day of April, 1919? A. I did.

Q. Where did you meet on that occasion?

(Testimony of C. W. Poole.)

A. We met in Howland Bancroft's office in the Symes Building.

Q. Did you meet later on that day at any other place? A. Yes. [366—361]

Q. Now on the day that you met in Mr. Taylor's office, was there any discussion of the tonnage of ore in the mine—this is on Tuesday, April the first? A. There was no discussion.

Q. On Tuesday, April the 1st, was anything done or arrived at in the way of the figures upon which the proposed option or contract was to be made with Mr. Taylor? A. Yes.

Q. In the course of that discussion did you see or hear Mr. Taylor say anything to Mr. Murrish with regard to advantages or disadvantages that would come to Mr. Murrish as a stockholder in the event that proposition made by him should be accepted? A. Yes, I did.

Q. Did you on that day and in connection with that conversation, see him produce or prepare any writing?

A. He produced a couple of sheets of paper, I remember that.

Q. I hand you Defendants' Exhibit "B," and ask you whether or not on that day, Tuesday, the first day of April, 1919, you saw that paper in Mr. Taylor's office? A. Yes.

Q. Did you read or hear the paper read, wholly or in part?

A. I don't think I heard it read wholly; it may have been read in part, I can't be certain of that;

(Testimony of C. W. Poole.)

it was lying on Mr. Taylor's desk, and there for our examination.

Q. Did you on that occasion hear Mr. Taylor say anything to Mr. Murrish with reference to the wisdom of the stockholders accepting the proposition contained in this paper? A. I did.

Q. What did he say on that occasion, as nearly as you can remember?

A. Well, he said, "If you accept this present proposition, your stock, if the mine lasts a considerable period, will be worth more to you than if I exercise my opinion of January the 16th."

Q. I call your attention to a portion of this exhibit reading as follows: "In order to make investment safe only necessary to show at eight-dollar market, 35,400 tons of ore; ten-dollar, 25,500 tons of ore." Did you on that occasion hear anything said upon that subject by Mr. Taylor?

A. Yes, I did.

Q. What in substance, did he say on that occasion?

A. He said that he contemplated if he got such a deal as is here proposed from us, that he would go East, and try and interest some trust company, and he felt that 35,000 on a ten-dollar basis would put that mine on a banking basis—on an eight-dollar basis—; and on a ten-dollar basis he felt that 25,000 tons would put the mine on a banking basis. [367—362]

Q. On the occasion that that document was presented, was anything said by yourself, Mr. Murrish

(Testimony of C. W. Poole.)

and Mr. Nenzel with regard to accepting its terms?

A. Yes, we tentatively agreed on the terms in that.

Q. As there expressed?

A. Well, we thought we were agreeing as they are there expressed.

Mr. THATCHER.—(Q.) As there expressed, do you mean by that exhibit? A. Yes.

Q. I call your attention to the following portion of the exhibit: "Incorporation \$1,500,000, 300,000 preferred, 7% cumulative, or cum. redeemable 200,000 com. treasury 300,000 preferred, 300,000 common. Issue 200,000 preferred, 200,000 common, 100,000 preferred, 100,000 common to leave in treasury. 40% to present owner, 60% to Taylor et als." Was this document in its present form taken by yourself, Mr. Nenzel and Mr. Murrish away with you on that occasion?

A. Yes, we took it away at noon.

Q. Do you know the occasion of your seeing Mr. Taylor again on that day, April 1st, in the evening? A. Do I know the occasion?

Q. The occasion of it, yes?

A. Yes. After Mr. Nenzel and Mr. Murrish and myself had taken this document, we returned to the Brown Palace Hotel; we read it over carefully and scrutinized it, and came to the conclusion that we had not understood what Mr. Taylor was proposing in that document; we thought—

Q. You say you thought, was it said between you?

(Testimony of C. W. Poole.)

A. It was said between us; when we accepted Mr. Taylor's proposition tentatively, that we had understood we were to get 40 per cent of our own stock, and he was to get 60 per cent of it.

Mr. THATCHER.—Well, if the Court please, I move to strike [368—363] out that; I thought it might arrive at some place, but it has not, I move to strike out all of the answer as being purely hearsay, and not binding on the plaintiff in this action.

Mr. WHEELER.—It may go out.

Q. I will just ask the witness if after Mr. Taylor came to the hotel you heard any discussion with Mr. Taylor, or had any discussion with him with regard to the matters contained in the exhibit which was shown you?

A. Well, we called Mr. Taylor up, and he did come to the hotel in the evening, and then we discussed that document with him.

Q. What did you say to him, all three of you in the presence of each other, say to him?

A. Well, we told him that we had not understood the document; that it apparently meant something we had not understood in our discussion that morning. We expected to go—

Mr. THATCHER.—I move to strike that.

Mr. WHEELER.—Say what you told him.

A. We told him that we understood it to mean that he was to get 60 per cent of our holdings in those corporations, and we were to retain 40, and that that would be the condition if there should be

(Testimony of C. W. Poole.)

organized his new company; but, as a matter of fact, with the organization of the new company, we would not have forty.

Q. That is as set forth upon that plan?

A. As set forth upon that paper.

Mr. THATCHER.—I move to strike out all the testimony here given by the witness in response to the question of the conversation, on the ground that they cannot vary the terms of a written instrument, and it is nothing more than the negotiations which led up to the instrument itself.

The COURT.—Was this conversation before or after the document was signed? [369—364]

Mr. WHEELER.—Before the document was signed; this is the night of April the 1st, and the document was signed April the 2d.

The COURT.—This was all merged in the written agreement, was it not?

Mr. WHEELER.—As a matter of law, from that point of view; but we are now meeting the alleged fraudulent representations which led to that agreement, and this shows the conversation which we insist makes it obvious that there were no fraudulent representations.

Mr. COOKE.—It tends to rebut the testimony of the plaintiff. Plaintiff testified that the making of this paper and discussion had completely gone out of his memory. It seems to me it would be proper for us to show the extent of that discussion, for the purpose of determining what credit should be

(Testimony of C. W. Poole.)

given to his testimony as to what he remembers.

(Discussion.)

The COURT.—Well, I still do not see the force of these last questions and the testimony that has come out. The conversation with reference to the amount of ore necessary, and the price that would make it a profitable deal, I think that should remain in, but the other I think should be excluded.

Mr. COOKE.—In regard to the apportionment of the stock?

The COURT.—Yes.

Mr. WHEELER.—And we, of course, have our exception.

The COURT.—That, as I understand, is what you objected to; the apportionment as to the amount of the stock, because it tended to contradict the terms of the agreement entered into on the following day?

Mr. THATCHER.—Yes, sir.

The COURT.—Well, I will sustain the objection to that.

Mr. WHEELER.—(Q.) When, if ever, did you, Mr. Nenzel and Mr. Murrish [370—365] give your assent orally to the proposition finally embodied in Exhibit “C” annexed to plaintiff’s complaint, that is, the contract of April 2d?

A. Mr. Nenzel and I agreed to it Tuesday evening, that would be April 1st; and Mr. Murrish gave his consent Wednesday morning, April 2d.

(Testimony of C. W. Poole.)

Q. Where did Mr. Murrish give his consent, that is, communicate his assent to Mr. Taylor?

A. In Mr. Taylor's office.

Q. At what time in the day, morning or afternoon, did you meet in Mr. Taylor's office on April the 2d.

A. We met in the forenoon, about nine or half past nine.

Q. What took place on that day with reference to the contract; was the contract, Exhibit "C" in its present form, prepared at the time that you reached Mr. Taylor's office on April the 2d?

A. It was not prepared at that time.

Q. After you arrived there state what took place with regard to the preparation of the contract, Exhibit "C"?

A. Mr. Taylor presented a typewritten contract to us, in which he had essentially embodied the terms as Mr. Nenzel and I had agreed with him on Tuesday night.

Mr. WHEELER.—Gentleman, have you that draft of contract; if you have we would like to inspect it.

Mr. THATCHER.—We have not, Mr. Wheeler.

Mr. WHEELER.—(Q.) Where did you last see that draft of contract?

A. The last time I saw it was in Mr. Taylor's office.

Q. What was done with it after it was presented by Mr. Taylor?

(Testimony of C. W. Poole.)

A. Well, Mr. Murrish took the contract and he read it; then he discussed it with me, and asked me if I had agreed to it, and I said I certainly have agreed to the substance of that, but as to whether what we agreed on is embodied in proper phraseology, or [371—366] legal phraseology, I don't know, Mr. Murrish; "Well," he says, "you understand English, don't you"? and I said, "Well, I—

Mr. THATCHER.—(Q.) Was this conversation in the presence of Mr. Taylor?

A. Yes, Mr. Taylor was right there. He says, "You understand English, don't you"? I says, "Yes, I think I do"; he says "Legal phraseology is no different from ordinary English," and he says "Is this intelligible to you"? and he proceeded to point out that the party of the first part and the party of the second part were confused in the body of the contract; that is, in places they were reversed, the party of the first part became the party of the second part; and he said "I will never agree to sign anything of that nature." Then Mr. Taylor proposed that he rewrite it, and embody the same essential facts in what he considered proper legal phraseology. Mr. Murrish and Mr. Taylor then retired to another room, and started to dictate this to the stenographer, and I was in and out of that room several times during the dictation, but I paid no particular attention to that thing, as I didn't pretend to understand the writing of contracts.

(Testimony of C. W. Poole.)

Q. Now after this dictation was in progress and before the contract in its proposed form came from the typewriter, or was signed, did you have any conversation with Mr. Taylor in which any map was used, or in any way written upon or drawn upon?

A. I did.

Q. Up to that time, that is, the moment on April 2d while this contract was in course of preparation, and before it was signed, up to that time had there on that day, or any previous day, been any discussion between you and Mr. Taylor in the course of which any plat had been written or drawn upon by either of you? A. No.

Q. On this day, the 2d day of April, what conversation took place between you and Mr. Taylor, in which a plat was discussed or used or drawn upon? [372—367]

A. Well, Mr. Taylor had several extra copies of this photostat, which is called plate 5 in Mr. Bancroft's report.

Q. Were they annexed to copies of the report, or were they separate and distinct?

A. They were additional copies that he got out of his own files or some one else's, I could not say.

Q. At any rate, they were not a part or parcel of any other document or paper?

A. Oh, no. And Mr. Taylor presented me one of those, and he says, "I wish you would put the additional development work on it that has been

(Testimony of C. W. Poole.)

done since Mr. Bancroft's examination of January the 22d."

Q. Now this, I understand you, he said, and this you did after Mr. Murrish had proceeded to draft or dictate the proposed form of contract?

A. Yes.

Q. What date was it?

A. It was Wednesday, April the 2d, in the forenoon, somewhere around ten or half past ten o'clock, may be later or it may be a little earlier; it was in the forenoon.

Q. Now who was present in the room at the time that this conversation between you and Mr. Taylor took place? A. Mr. Nenzel.

Q. Where was Mr. Murrish?

A. I think that he was dictating the contract; I could not be certain of that fact because after Mr. Murrish had dictated this contract he left, and whether he had the contract finished, and had gone, or was still dictating it, I could not be certain.

Q. State fully what was said and done on that occasion at that time and place?

A. Mr. Taylor handed me one of these photostats, this plate 5 in Mr. Bancroft's report, and said "I wish you would put additional work on there which has been done since Bancroft's examination, and also I wish you would show the additional tonnage or ore which has been developed by that additional work, and use the method that Bancroft has used in his report"; and I said, [373—368] "Mr. Tay-

(Testimony of C. W. Poole.)

lor, it is very easy to put additional work on there, but it is not easy to calculate the additional tonnage according to Bancroft's method, because it is not clear what method Mr. Bancroft has used in his report in calculating tonnage"; "Well," he says "I have the tonnage method used by Mr. Bancroft"; he then got some memorandum or else letters, or letters and telegram, but it certainly was a written document of some kind, setting forth how Mr. Bancroft calculated tonnage according to different development.

Mr. WHEELER.—Have you in your possession, gentlemen, or under your control, any document, either in Mr. Bancroft's handwriting or any telegram, or any data or memorandum, showing Mr. Bancroft's method of calculation, if so, we would like it.

Mr. THATCHER.—If we have it we will produce it.

Mr. WHEELER.—Proceed.

A. At that time I call Mr. Taylor's attention to the fact that the data upon the map which I had brought back there did not enable any one to calculate tonnage of ore; that it was sufficient to calculate tonnage, but that the tonnage was not necessarily ore. He said "That does not make any difference, what I want to do is to get sufficient data to present to Mr. Bancroft to show him that there has been enough additional development work done there since his last visit to warrant him going again, and I want to use that to urge him, as I have been

(Testimony of C. W. Poole.)

urging him, to go, and he does not want to go; and I want to use this to urge Mr. Bancroft to go there again'?"

Mr. COOKE.—Go where?

A. To the mine, the Nevada Humboldt Tungsten Mine, and examine it again. I said, "All right, then, Mr. Taylor, I will assist you in getting that data from these maps which I have with me, but it will be necessary for us to have an engineer's scale in order [374—369] to scale the distances off my map," because there were no distances measured, simply a graphic representation according to scale. So he searched through Mr. Bancroft's office, particularly in another room where there was a drafting table, and he could not find an engineer's scale, so we used an office scale, an ordinary office rule, showing inches and eighth of inches, while my map was on a scale of forty feet to the inch. Mr. Taylor then took this extra photostat and used one scale and I used another, and I scaled off my map the distances on my map, and he set them down graphically and he also wrote down the distances. After that—

Mr. WHEELER.—(Q.) One moment, please. You speak of "my map," what map do you refer to?

A. I refer to the mining map of the Nevada Humboldt Tungsten Mines Company, I had with me.

Q. I hand you a map upon which are the words, "S. P." Vein, Looking N. W., I ask you whether

(Testimony of C. W. Poole.)

or not that is the map just referred to by you as being the map which you had with you on that occasion?

A. That is the map, there have been some additions since that occasion, it is not exactly in the same condition.

Q. This is the identical map you had with you, although some changes have taken place on it since? A. Yes, the identical map.

Mr. WHEELER.—I offer the map in evidence, and ask that it be marked our Exhibit “Y.”

(The map is admitted in evidence and marked Defendant’s Exhibit “Y.”)

Q. Turning to Defendant’s Exhibit “Y,” I call your attention to the figures appearing thereon, and the lines, and ask you to state as accurately as you can, and in such way that it will be intelligible in the record, what additions were made to that map at a period subsequent to the 2d day of April on this occasion when you and the [375—370] plaintiff were together?

A. All of the lead pencil marks purporting to show mine workings, with the exception an extension of a level in the northeast corner of the map. Also the figures—am I testifying now as this map was when we presented it right then and there at that occasion?

Q. What I want you to do is to describe what is there on the map which was not there at that time, and describe it in such way that the record,

(Testimony of C. W. Poole.)

with the map in hand, will show what you are testifying to.

A. All figures showing percentage, average width or extremes of width were on the map at that time; there are other figures here scattered throughout the map which were not on there at that moment.

Q. Can you specify those that were not on there at that moment?

A. The figures 4200 was not on there; the figure 9250 was not on there; the figure 2048 was not on there; the figure 1080 was not on there; the figure 4860 was not on there.

Q. Have you now told us all the figures that were not on there? A. I have.

Q. And have you designated the lines that were not on there? A. I think so.

Q. Were any extensions of the shaft now appearing on there that were not there at that time?

A. This extension in lead pencil was not on there at that time.

Q. By this "extension in lead pencil" you mean—

A. On the main working shaft.

Q. On the main working shaft coming down to the red line?

A. Well, from the ink line downward, there was nothing at that time.

Q. Now you have mentioned use by you of the ruler scale, you say [376—371] you had one and Mr. Taylor had another, or that you used the same ruler for that purpose?

A. He had one and I had one.

(Testimony of C. W. Poole.)

Q. Describe what sort of rules they were.

A. Well, they were office rulers, I think they had advertising matter printed on them; they were twelve-inch rulers.

Q. Now proceed and tell just what took place from the time that you began to use the ruler and the time that he began to use the ruler?

A. Well, we both started to use the ruler together, I scaled this map, and he transferred it to his photostat.

Q. By this map you mean Exhibit "Y."

A. Yes.

Q. You say he transferred it to his photostat?

A. Yes.

Q. What do you mean by that, transferred it from what?

A. Well, I mean that he drew the same distances which I was scaling on his own map, photostat map there, but to another scale, because his map was of a different scale.

Q. Did he look at your map, and then put down the lines, or did you call off the lines and angles to him?

A. I called off the distances, there were no angles.

Q. So much then as to the distances; did you at that time give him any figures, or read to him any figures?

A. Well, the distances were figures, they were feet.

Q. Well, were the number of feet put down by him upon this other map, this photostat, which is

(Testimony of C. W. Poole.)

not in evidence, and which he was then using?

A. That is my recollection of it, he not only drew the distances, but he put the number of feet down also.

Q. What else took place?

A. Well, he then referred to Mr. Bancroft's method of calculating ore as blocked out on one side, two sides, three sides, four sides, and as to whether the two sides were at right angles or parallel, and from that data he proceeded to calculate the number of tons of ore in a given block, and I [377—372] wrote them down on this photostat map.

Q. Who did the calculating, you or Mr. Taylor?

A. Mr. Taylor did the calculating, because I didn't know—it started out that I didn't know how many cubic feet of ore Mr. Bancroft called a ton, and he finally dug that figure up, which was fourteen cubic feet, as I recall it, per ton of ore, and from that point we started to calculate, and he started the calculations.

Q. You say we started to calculate, who calculated, you or he, or both?

A. He did the calculation, he did the mathematical calculations from the dimensions I had given him and from the divisions for tonnage, and I entered them on the photostat map?

Q. And he gave you the results which you entered on the photostat map? A. He did.

Q. Then the figures, other than the representation

(Testimony of C. W. Poole.)

of feet, were furnished you by him, as I understand it? A. Yes, they were.

Mr. THATCHER.—I object, it calls for the conclusion of the witness, and assumes something not in evidence.

The COURT.—Well, the question is leading.

Mr. WHEELER.—(Q.) Who wrote down the figures on that photostat map? A. I did.

Q. They were all in your handwriting?

A. All with the exception of distances; I think he wrote the distances down, as well as drew them.

Q. When you finished what was done with the photostat map you were using on that day?

A. It was left with Mr. Taylor.

Q. Is the map plate 5, annexed to Exhibit 15, the same photostat that was used on that day in Mr. Taylor's office by you and Mr. Taylor in the way you have just indicated? A. No, it is not.

Q. Upon the map which you used on that day was there any statement, [378—373] of were there any figures indicating the number of tons in any portion of the area represented by the map?

A. There were figures representing the tonnage, yes.

Q. State what they were.

A. What the tonnage figures were?

Q. Yes.

A. Well, I recall one quite distinctly, and that is the figure 4200; that is certainly one of the figures that we got as a result of that calculation; I am not certain positively as to the others; I can be certain of

(Testimony of C. W. Poole.)

this, that there was no block in which there was 42,000 tons. I can further be certain that the sum total of the tonnage represented in all the blocks was not 42,000.

Q. Was it more or less? A. It was less.

Mr. WHEELER.—Gentlemen, if you have that map in your possession or under your control, photostat described by the witness with figures thereon in his handwriting, and other letters and figures thereon in the handwriting of Mr. Taylor, we would request its production.

Mr. THATCHER.—We haven't it; if we have I don't know it, I would like to see it myself.

Mr. WHEELER.—(Q.) Did you on that occasion, or on any previous occasion, or at any time prior to the moment that the signatures were placed upon the contract, Exhibit "C," on the 2d day of April, 1919, say or state to Mr. Taylor that there were 60,000 tons of ore either blocked out or developed or in sight in that mine?

A. I certainly did not.

Q. Did you make any representations or use any words to that substance or effect?

A. I certainly did not.

Q. Did you on that occasion, or on any occasion prior to the entering into the contract Exhibit "C," state or represent to him that there were in that mine either blocked out or in sight or developed [379—374] any quantity of ore whatever?

A. I did not.

(Testimony of C. W. Poole.)

Q. By that I mean specific quantity and number of tons? A. I did not.

Q. When was the contract Exhibit "C" signed with regard to the conversation that you have just testified to?

A. The contract was signed subsequent to the conversation.

Q. Do you remember how soon the typewriting on the contract was completed, whether the contract was signed on the morning or the afternoon of April 2d?

A. It was signed in the afternoon of April the 2d.

Q. Intermediate to the time testified to by you, in which these figures were put down on the photostat on the 2d day of April and the time that the contract was signed, was there any other or further discussion in which tonnage or development or figures of ore or ore bodies was mentioned?

A. No, there was not.

Q. Were the figures as to values, or any of them appearing on plate 5, other than those which appeared upon the original photostat, placed either by you or by Mr. Taylor upon the photostat which you say was used on the 2d day of April in the conversation that you had with Mr. Taylor?

A. I don't think the percentages were placed on that photostat, though I could not be certain of that. May I amplify that statement?

Q. Yes, make any explanation that is responsive.

A. I had cautioned Mr. Taylor against the unre-

(Testimony of C. W. Poole.)

liability of those estimates on the map, and I scarcely think that I would have put them down myself on that photostat; he may have put them down and I not know it, as he had our maps most of the time while we were in Denver, but I don't recall having put those percentages down myself, and I scarcely think I would have done it. [380—375]

Q. By that photostat what photostat do you mean?

A. I mean the photostat I have just described as prepared by Mr. Taylor and myself.

Q. On the 2d day of April? A. Yes.

Q. When you speak of those figures you cautioned him against, what figures do you refer to?

A. I refer to the figures in this exhibit of our map, whatever you call that, the one you just put in evidence.

Mr. THATCHER.—The mine map, Exhibit “Y”?

A. Yes.

Mr. WHEELER.—(Q.) By that you mean the figures—

A. (Intg.) The figures showing certain percentages, shown on the map in several places.

Q. The figures showing the percentages, not the figures showing the tonnage?

A. No, just the figures showing percentages.

Q. What did you say to him on that subject, you say you cautioned him?

A. I told him those figures were merely estimates which had been placed on that map by John Huntington, who was the mining engineer who had

(Testimony of C. W. Poole.)

brought this map up to date, and that Mr. Huntington had gotten that information from Mr. Morrin, who was the superintendent, and Mr. Morrin had arrived at those values by panning in the mine; and he knew, as well as I did, that panning was a very unreliable way of arriving at the value of ore.

Q. This you say was what you said to him?

A. Yes.

Q. How soon after the contract Exhibit "C" was signed did you leave Denver?

A. Well, I left in the afternoon on the earliest train I could get, I think it left around three or four o'clock.

Q. Did you have any other conversation with Mr. Taylor after the contract was signed in which tonnage was mentioned, or any figures were discussed? [381—376]

A. No, I did not.

Q. Do you recall seeing Mr. Taylor and Mr. Jackson at the mine at any time in the month of May, 1919?

A. I do.

Q. On that occasion did you go into the mine with either of those gentlemen?

A. I went into the mine with Mr. Jackson.

Q. Who else accompanied you upon that trip?

A. Mr. Morrin, the superintendent of the mine.

Q. What portions of the mine did you visit on the occasion of that trip?

A. We visited the third level north and the shaft all the way down, particularly the part of the shaft between the fourth and fifth levels.

Q. Any other part or portion of the mine?

(Testimony of C. W. Poole.)

A. Not that I recall; we may have gone into the third level south, and we may have gone up on the second level south where there was some water; but we were visiting particularly the shaft between the fourth and fifth levels and the third level north from the main shaft.

Q. What did you do while in the mine?

A. Mr. Morrin and I panned a great deal.

Q. Who was Mr. Morrin?

A. Mr. Morrin was the superintendent of the mine.

Q. When previously to that visit had you last been in the mine?

A. I had been in the mine on April 9th.

Q. Prior to April the 9th—that then was after you returned from Denver? A. Yes.

Q. Prior to April the 9th what had been your last previous visit to the mine?

A. At the time of Mr. Bancroft's examination.

Q. So you had not been in that mine from the time of Mr. Bancroft's examination until after the contract Exhibit "C" was signed? A. I had not.
[382—377]

Q. How many pannings approximately were actually made in the mine in the presence of Mr. Jackson on the day you have referred to when he visited the mine in company with Mr. Taylor?

A. In Mr. Jackson's presence?

Q. Yes.

A. Well, I could not be certain. Mr. Jackson was not with us every minute, and we were panning

(Testimony of C. W. Poole.)

constantly; he saw a great many pannings, just how many I could not say.

Q. Where did you take or make pannings on that day?

A. In the third level north, and in the shaft between the fourth and fifth levels.

Q. Did you make pannings of all those portions of the mine while in the mine on that occasion?

A. No, we brought some of them to the surface.

Q. You made some in the mine?

A. We made some in the mine and we brought a few samples as we came to the surface, we wanted to show those to Mr. Taylor.

Q. The pannings you took in the mine were taken in what way, describe it to the Court, please.

A. The samples for the pannings?

Q. Yes.

A. Well, they were taken in numerous ways; some places we made a grab of the muck pile, that is, simply grabbed a handful here and there from the broken ore, but in most places we chipped out pieces into our pan and mortared them up and panned those, because we were particularly interested, or I was, in knowing what certain ground that we had already gone through were panning, and we were forced to take samples out of solid as well as out of the muck pile.

Q. Did you dig any trenches across the sides or width of the vein across the roof, or across the bottom?

A. Oh, no, no we didn't dig trenches, we just

(Testimony of C. W. Poole.)

simply took pieces [383—378] here and there; I would not say our sampling was absolutely accurate sampling, in fact I know it was not.

Q. Pursuing that method on that day what was the result of the pannings taken in the mine?

A. We got some good pannings and some poor pannings.

Q. Were all of the good pannings found in different places from the poor pannings, or did you find some poor pannings and some good pannings in the same vicinity?

A. Well, in the third level north there was a great question in my mind as to whether that was good ore or poor ore, and we panned very closely there. No, I don't recall that we got a good panning at a particular point, and then went back and got a bad panning, but I do recall that the nature of that drift was spotty, that is, there was ore here and there.

Q. Did you make any pannings at places that had been developed since the 2d day of April?

A. Well, all this shaft had been developed since the 2d day of April.

Mr. COOKE.—(Q.) All of the shaft where?

Mr. DAVIS.—(Q.) You mean all below the fourth level?

A. All below the fourth level is the part I am speaking about now.

Mr. WHEELER.—(Q.) So all the pannings you took below the fourth level were pannings from ground that had been developed after the contract of

(Testimony of C. W. Poole.)

April 2d had been entered into? A. Yes.

Q. In the bottom of that shaft did you take any pannings? A. Yes, we took numerous pannings.

Q. With what results?

A. That we got some very good ore.

Q. What pannings did you take and complete on the surface after [384—379] you had come out of the mine?

A. I recall that we took one from the bottom of the shaft and one from some point on the third level north, but exactly where that panning on the third level north came from I don't now recall.

Q. While you were in the mine on that occasion did you make any attempt to measure up the tonnage that was in the mine? A. No.

Q. Did you on any other occasion prior to your coming to San Francisco in the latter part of May or the first part of June, 1919, make any measurements for the purpose of checking up the quantity of ore in the mine?

A. Yes, I did on one occasion when Mr. Taylor was present, that was after April the 9th; I did not go down the mine with Mr. Taylor on a visit which he made to the mine in April, and at that time I took a tape underground with me, to see that the representations of distances that I had made in Denver were correct, and he and I measured several places, and after measuring a few I said, "Do you want to go all through, and measure them"? he said "No that is enough, I am satisfied that the distances are correct."

(Testimony of C. W. Poole.)

Q. So you had been in the mine one more time than you remembered a moment ago?

A. Yes, I wish to correct that.

Q. You say the measurement of distances which you represented in Denver, what do you mean by that statement?

Mr. THATCHER.—I object, the witness has already testified.

Mr. WHEELER.—(Q.) Well, explain what representations of distances you had made when in Denver?

A. Well, I had presented our mine map with certain extensions on which had been made subsequent to Mr. Bancroft's report, and I wanted to convince Mr. Taylor that that work had actually been done. [385—380]

Q. Then the representations you referred to a moment ago were representations already referred to by you as being upon that map which you scaled and gave him the distances of? A. Yes.

Q. On April 2d?

A. The map which I gave him on April 2d, yes.

Q. On this occasion when Mr. Jackson was there, did you make any measurements whatever of the quantity of ore in the mine? A. Oh, no.

Q. Did you go into the mine for that purpose, was anything said about it before you went into the mine? A. No.

Q. What if anything was said as to the purpose for which you were going into the mine, said in the

(Testimony of C. W. Poole.)

presence either of Mr. Jackson or Mr. Taylor, before you went into the mine?

A. Well, before going to the mine Mr. Taylor had shown me a map which purported to show assays which Bancroft had gotten at his second examination, and they were all very low; the map was on tracing paper, and was drawn with a red pencil, and had assays on it on the third level north, and on the shaft between the fourth and the fifth levels; these assays were all very low, so—

Mr. WHEELER.—One moment, please. Gentlemen, have you that map?

Mr. THATCHER.—We have not.

Mr. WHEELER.—Proceed.

A. These assays were all very low, and when we got to the mine I took this map and showed it to the mine foreman, and I said “There is part of what Mr. Bancroft has found in this mine at his second examination.”

Q. Did you say this in the presence of Mr. Taylor and Mr. Jackson, or only Mr. Jackson?

A. Yes, both of them, they were both there; and the foreman looked at the map, and he says, “I don’t care what Bancroft [386—381] says, there is ore in that third level north, and there is ore in the bottom of the shaft,” and he says, “If you will come down the mine I will prove it to you,” and we went down in the mine with that point in mind, because from the conversation I had had with Mr. Taylor, I didn’t know whether these were Bancroft’s assays or what they were, and I thought if they were Bancroft’s

(Testimony of C. W. Poole.)

assays it will be very easy to check them up by panning; that is, one can have some idea as to what the mine is by assays, or as to whether there is some ore in it.

Q. The pannings that you have spoken of having taken on that day were made, or were they not made in the portions of the mine that you have just referred to?

A. Yes, that is the portions of the mine they were made in.

Q. Now as to the third level, what was disclosed by the pannings; what was the result of the pannings made of ore in the third level?

A. That there was good ore and bad ore.

Q. But it was not one solid mass of good ore as disclosed by your pannings, is that right?

A. It was not one solid mass of good ore and not one solid mass of bad ore, or waste?

Q. But there was some good ore and some bad ore at every place?

A. At different places the ore was spotted; there was spots of bad and spots of good, that is what I mean to say.

Q. Did Mr. Taylor tell you what assays were represented upon that map, whose assays?

A. He said they were Bancroft's assays; that is they were assays of the samples taken by Bancroft at his second examination.

Q. Among them does there purport to be any of ore in the shaft?

(Testimony of C. W. Poole.)

A. There wasn't a single sample which showed any ore in the shaft. I may add at this point that from the appearance of this map it was not a complete map even of those portions which it showed. As I [387—382] understood Mr. Bancroft's method of sampling he took samples every ten feet, and these assays platted on that map were not platted every ten feet, but there was an assay here and there, just portions of the samples.

Q. Were these pannings taken in places where the development work had taken place prior to or subsequent to the second day of April?

A. Well, the developments in the third level north had taken place in the main, prior to the 2d day of April, practically all of those. The development in the shaft, the shaft was ten feet below the fourth level when we went back to Denver, went back to Denver in March, the rest of it was subsequent—the rest of the shaft was subsequent to the Denver conference.

Q. As I understood you a moment ago, and perhaps I didn't get you correctly, you went into the shaft on that occasion with the idea of examining the ores in the shaft in order to check up this report of Bancroft's?

A. Particularly between the fourth and fifth level, because that is all the assays we had, or Mr. Taylor had.

Q. Was there upon that map anything that purported to be an assay of ore between the fourth and fifth level?

(Testimony of C. W. Poole.)

A. No, there wasn't a single sample showing any ore.

Q. Then what was the occasion of checking that portion of Mr. Bancroft's work?

A. Well, the very bottom of the shaft showed no ore, and the foreman insisted there was ore in the bottom of the shaft.

Q. And Mr. Bancroft's assays showed no ore in the bottom of the shaft? A. Yes.

Q. And the foreman insisted that you should go down there to check that? A. Yes.

Q. And you did go down?

A. Yes. 388—383]

Q. Did you make your pannings there?

A. We made pannings down in the mine in the shaft where there was water down there, and then we brought one sample on top to show Mr. Taylor.

Q. What was the result of the pannings you took down in the mine?

A. Down in the mine or down in the shaft?

Q. I mean to say in the shaft, in the bottom of the shaft?

A. In the bottom of the shaft on the north side we found very good ore; on the south side we found low grade ore, that is, in the bottom, and from there—

Mr. THATCHER.—(Q.) Do I get that right, the north side was good ore and the south side was low grade?

A. Was very low grade; I would not say it was

(Testimony of C. W. Poole.)

ore at all, it was simply a low grade vein.

Mr. WHEELER.—(Q.) However, this was the bottom of the shaft?

A. Yes, sir.

Q. And it was the bottom of the shaft as it appeared 100 feet or thereabouts below where it had been on April the 2d? A. Yes.

Q. But in Mr. Bancroft's report, or as it was represented to you, there was an assay appearing as having been taken from the bottom of the shaft?

A. Yes, there was an assay.

Q. Now you say you took one sample up to the surface, was that done in the presence of Mr. Jackson or Mr. Taylor, or either of them? A. Yes.

Q. With what result?

A. Mr. Taylor said he was not interested in any panning, and he was going to abide by Mr. Bancroft's report.

Q. What did that assay show?

A. It showed good ore, it came from the north side of the shaft. [389—384]

Q. That came from the north side, and not from the south? A. Yes.

Q. In the course of that conversation did you say, in substance or effect, either to Mr. Jackson or Mr. Taylor, or in the presence of either of them, that Mr. Bancroft's report on the tonnage of that mine was right? A. I certainly did not.

Q. Was there any discussion as to the tonnage in the mine? A. There was not.

(Testimony of C. W. Poole.)

Q. Had you on that occasion made any investigation of the tonnage in the mine? A. I had not.

Q. Had you intermediate to that occasion and the time you had been in Denver, the 2d day of April, 1919, made any investigation of the tonnage in the mine? A. I had not.

Q. Do you recall a meeting in San Francisco with Mr. Jackson, Mr. Bayless, Mr. Taylor, in which Mr. Jackson proceeded to state certain matters concerning the transaction of April the 2d?

A. Was I present?

Q. Yes. A. Yes, I was.

Q. Who else was present on that occasion when Mr. Jackson was making his statement?

A. The first occasion when Mr. Jackson made any remarks there was present Mr. Nenzel, Mr. Murrish and Mr. Jones and myself, and Mr. Taylor and Mr. Bayless.

(A short recess in taken at this time.)

Q. Mr. Poole, did you ever either at the mine or in Lovelock in the company's office, or elsewhere in the State of Nevada, say anything in substance or effect that you had represented to Mr. Taylor that there were 60,000 tons, or at least 60,000 tons, or any number of tons whatever, of ore in the mine belonging to the defendant corporation, the Nevada Humboldt Tungsten Mines Company?

A. No, I never did. [390—385]

Q. Did you ever silently acquiesce in any statement made in your presence to the effect that you

(Testimony of C. W. Poole.)

had represented to Mr. Taylor that there were 60,000 tons of ore in the mine belonging to the defendant corporation, the Nevada Humboldt Tungsten Mines Company?

A. Not 60,000 tons, no.

Q. You say not 60,000 tons; well, any other number of tons?

A. Well, there may have been some mention of tonnage in that conversation in San Francisco, I can't be positive about it, I don't recall it myself, but my associates say that something like that took place.

Q. Never mind what your associates say; the question is did you ever by word of mouth or by your silence intend to acquiesce or agree to any statement made in your presence by any person to the effect that you had represented that there were 60,000 tons of ore, or thereabouts, or any other sum approximating that amount, in the mine belonging to the defendants, Nevada Tungsten Mines Company?

Mr. THATCHER.—Objected to as calling for the conclusion of the witness, and as to his intentions. He can state what he did and what was said, and the Court can judge as to the intentions.

Mr. WHEELER.—It was said by some witness here that he nodded his assent.

Mr. THATCHER.—That is all right, I don't object to that.

The COURT.—He can deny that if he wishes;

(Testimony of C. W. Poole.)

but as to stating what his intention was, I don't know.

Mr. WHEELER.—(Q.) Did you on any occasion in San Francisco say in response to any statement in substance or to the effect that you had represented to Mr. Taylor that there were 60,000 tons of ore developed in that mine, meaning the mine belonging to the defendant corporation, the Nevada Tungsten Mines Company, say yes, that is so? [391—386]

A. No, I never did.

Q. Did you on any occasion in response to a statement by any person in our presence to that effect, in substance, nod your head affirmatively?

A. No.

Q. Did you assent either orally or with a nod of your head, or with the phrase, yes, that is so, or otherwise, to any statement made by Mr. Jackson in your presence, alleged to have been made by you to Mr. Taylor, in substance or to the effect that the mine, meaning the mine of defendant Nevada Tungsten Mines Company, contained 60,000 tons of commercial ore? A. No, I did not.

Mr. WHEELER.—Take the witness. Let it be understood, please, by opposite counsel that when I have said Nevada Tungsten Mines Company, I meant Nevada Humboldt Tungsten Mines Company, and I was so understood by the witness. That is the fact, is it not, Mr. Poole, that you understood I meant Nevada Humboldt Tungsten Mines Com-

(Testimony of C. W. Poole.)

pany? A. That has been my understanding.

[392—387]

(By Mr. COOKE.)

Q. Mr. Poole, in the conference which you testified you had at Denver on or about April 2d, 1919, what, if anything, did Mr. Taylor say as to his reliance upon the estimates which you told him were furnished by Mr. Morrin?

A. He told me that Mr. Bancroft—

Mr. THATCHER.—I am going to object to that. This was the first of April, was it?

Mr. COOKE.—Either the first or second.

Mr. THATCHER.—It don't seem to me this witness has testified as yet to any estimates given by Mr. Morrin; if he did I would like to have the testimony.

Mr. COOKE.—He stated certain figures in connection with these matters were panning estimates by Mr. Morrin.

Mr. THATCHER.—If you are referring to panning, all right; assays are values.

The COURT.—Proceed.

(The reporter reads the question.)

A. He told me he didn't place any great reliance in Mr. Morrin, because Mr. Bancroft had so reported that Mr. Morrin was not very reliable, and he didn't like him.

Q. Mr. COOKE.—What, if anything was said as to taking his percentage estimates for what they were worth?

(Testimony of C. W. Poole.)

A. Well, I told Mr. Taylor that these were Morrin's estimates, and he could take them for what they were worth; then is when he told me that he didn't place any great reliance on any of Morrin's estimates, because Mr. Bancroft had reported Morrin was not a very reliable man, and he didn't like him.

Q. In that connection, or at any time in that conversation, did Mr. Taylor say in whom he did place any reliance with reference to the matter of percentage estimates, tonnages developed, or the like? [393—388]

A. Yes, he said that he was going to absolutely rely on Mr. Bancroft; that while he didn't like him as a man, he certainly admired him as a technician; he went on to cite an instance of Mr. Bancroft's smallness as a man, he said that he had obtained a valuable—

Mr. THATCHER.—Objected to on the ground it is incompetent, irrelevant and immaterial.

Mr. COOKE.—I am asking for the conversation.

The COURT.—It don't seem to me there is any necessity of drawing that out.

Mr. COOKE.—It has some little relevancy to the matter; I don't insist upon it, though.

Q. What, if anything, did Mr. Taylor say with reference to when Mr. Bancroft would be available to take this work up in the mine, this new work that had been done since the former Bancroft report?

(Testimony of C. W. Poole.)

Mr. THATCHER.—This was in April, was it, the first of April?

Mr. COOKE.—Yes, this is all April I am talking about.

A. As I recall that conversation, he told us that Mr. Bancroft was either in San Francisco, or would shortly be in San Francisco and he expected he would come out right away, and Mr. Taylor expected to come with him.

Q. Was anything said as to the number of days or weeks by Mr. Taylor within which he expected to have Mr. Bancroft at the mine in company with himself to make this investigation?

A. He expected to come immediately, because, as I recall it, Mr. Bancroft could only come in the very near future.

Q. What, if anything, was said by Mr. Taylor at that time to yourself with reference to your connection with the property, in the event that he made a deal, your future connection with the property? [394—389]

A. Well, he led me to believe that I was going to be the superintendent.

Q. Well, I am asking what he said, if you can give it.

A. Well, when I made the representation as to distance and assays, and the explanations accompanying them, I told Mr. Taylor, I said, "I will vouch for these distances, because Mr. Huntington is an accurate surveyor, but I won't vouch for these estimates on here as having any meaning," and I

(Testimony of C. W. Poole.)

said, "I want you to get that clearly in mind, because I don't want to make any misrepresentations to you"; and he says, "The only effect that any misrepresentation on your part would have on me would be to cause me to lose confidence in you, and therefore I would not use you as superintendent of the property."

Q. Previous to that had he said anything about expecting, or intending to use you as superintendent of the property?

A. Well, in San Francisco in January, when we entered into that contract, Mr. Thane in Mr. Taylor's presence, and also in Mr. Bancroft's presence, had said we would like to have you join us in this venture, and we would like to have you be superintendent of the property.

Q. What, if anything, did that conversation or those conversations where they spoke to you upon that subject, have to do with your attitude with reference to being conservative or otherwise, in discussing the property?

Mr. THATCHER.—Object to the question as leading, and calls for the conclusion of the witness.

The COURT.—The question is objectionable.

Mr. COOKE.—(Q.) What, if anything, did the financial condition of the Nevada Humboldt Tungsten and the Tungsten Products have to do with your making this trip to Denver? [395—390]

Mr. THATCHER.—I object on the ground it is incompetent, irrelevant and immaterial.

(Testimony of C. W. Poole.)

Mr. COOKE.—I want to show if I can, in this way, that the condition with reference to deferring the indebtedness, which was then matured and pressing us, was an inseparable part of this contract which was afterwards negotiated.

Mr. THATCHER.—If that is the case I will withdraw the objection; but I object to it if it is intended to be used to vary the terms of the written contract itself; if they want to show what the conditions were for any other purpose, I don't care.

Mr. COOKE.—It is not offered to vary the terms. I will say very frankly my purpose is to show they went down there oppressed by reason of the financial condition of the company, and these debts piling on them, and they didn't go down there simply for the purpose of getting a substitution of creditors; it was necessary for them to get time to work out, and this was why this 7 per cent preferred stock arrangement was an inseparable part of their proposed plan, something of that kind that would give them time; just simply to go down and have a substitution of creditors would amount to absolutely nothing.

Mr. THATCHER.—If that is the case, I am going to object on the ground it is introduced for the purpose of varying the terms of the contract.

The COURT.—Objection sustained.

Mr. COOKE.—(Q.) In the conversation that was had at Denver during these two or three days immediately preceding the signing of the agreement of April 2d, was anything said by Mr. Taylor or

(Testimony of C. W. Poole.)

Mr. Murrish, or by any of the parties there, relative to other persons who might be interested in the property?

Mr. THATCHER.—Objected to as incompetent, irrelevant and immaterial. [396—391]

The COURT.—I don't see the relevancy of it, Mr. Cooke.

(Discussion.)

The COURT.—I will sustain the objection.

Mr. COOKE.—We desire the benefit of an exception on the ground the testimony is competent for the purpose of tending to prove that the representations were not made as alleged.

Mr. COOKE.—(Q.) Calling your attention to some time about the middle of April, 1919, when Mr. Taylor visited the mining property, was that in company with you?

A. Yes, I met him at Imlay, and accompanied him to the mine.

Q. Did anybody else go with you to the mine?

A. Nobody from Imlay to the mine, no.

Q. At that time did Mr. Taylor say anything about Mr. Bancroft, and any reasons why he did not accompany him to the property?

A. He said that Mr. Bancroft had gone on some other examination.

Q. What if any examination of the property did Mr. Taylor make at that time?

A. He went all through the mine, and he visited the mill, and he went over the surface some; not very much over the surface, however.

(Testimony of C. W. Poole.)

Q. How nearly can you fix the date of that examination?

A. I can't fix it within ten days; I know I went east about the first week in May, and I know that Mr. Taylor had been there ten days or two weeks before I went east; that is as close as I can come to it.

Q. So far as you know, did he have any business or object in visiting the property, other than an examination of it?

Mr. THATCHER.—Objected to as incompetent, irrelevant and immaterial, and calls for the conclusion of the witness.

Mr. COOKE.—(Q.) Well, what did he say as to what he wanted to go to the property for?

A. He said he came down to see it. [397—392]

Q. Did he see it? A. Yes, he saw all of it.

Q. What was the extent of his examination with reference to being thorough, or otherwise?

Mr. THATCHER.—Objected to as calling for the conclusion of the witness.

Mr. COOKE.—(Q.) What was the extent of it, as to where he went and what workings he visited?

A. He saw all of our underground main workings; he measured up quite a few of the workings with me; he panned some himself, and Mr. Morrin and I panned a great deal for him.

Q. Was Mr. Morrin with you during the entire trip through the mine? A. Yes, he was.

Q. Just you three?

(Testimony of C. W. Poole.)

A. Yes, that is all; we met the workmen in the mine as we went about.

Q. How did he come to do any panning, at whose suggestion was that? A. I suggested it to him.

Q. How did you suggest it, what did you say?

A. Well, it was after we had measured up the distances; I said you had better take some pannings here and get some idea of these values yourself.

Q. These distances that you say you measured, what did those measurements refer to?

A. Well, those were the distances which I had given him in Denver, as new data since Bancroft's report in January.

Q. And about how many pannings did he take?

A. Well, he took five or six, but he was not a skillful panner, and he was satisfied to let us do the panning.

Q. How many pannings did you and Mr. Morrin take in his presence while you were together?

A. We took a great many, a hundred I should say.

Q. A hundred pannings? A. Yes. [398—393]

Q. How long a time did you spend in the mine doing this panning and examination, approximately?

A. I think we were in the mine about four hours.

Q. Were there any workings or openings underground that you didn't visit?

A. There were no openings in the mine, in our main workings, that were not visited; there are other workings in that property which Mr. Bancroft

(Testimony of C. W. Poole.)

does not mention in his report, or if he does mention them he don't emphasize them; we didn't visit them; we simply went down the main workings, down the main shaft.

Q. Who suggested the particular places from which the samples should be taken which you panned? A. We all suggested.

Q. Did Mr. Taylor suggest any place from which he wanted pannings made? A. Yes, he did.

Q. And were they panned?

A. Yes, they were.

Q. After the examination was made, as you have described, what, if anything, did Mr. Taylor say as to the result of it?

A. When we came to the surface at the collar of the shaft, he says to me, "I am more than pleased."

Q. Subsequent to this did you have any conversation with Mr. Taylor with reference to the people he expected to finance the property for him who wanted control; was that subject discussed between you and him?

A. He mentioned some of the people that he expected to get in the deal with him, I could not say that they expected to take control.

Q. The subject of their wanting control was not discussed, you mean? A. Not by Mr. Taylor.

Q. Was it by Mr. Thane? A. Yes.

Q. Where was that discussion had?

A. In New York.

Q. What did he say?

A. It was right after my arrival in New York.

(Testimony of C. W. Poole.)

I met Mr. Thane and I asked him how Mr. Taylor was getting along— [399—394]

Mr. THATCHER.—I object to conversations with Mr. Thane.

Mr. COOKE.—We submit he was a partner in this venture, he was an interested party, or was up to a few days ago, apparently, as shown by the testimony of Mr. Taylor and everybody who testified, while not an equal party, a party interested, and I think his representation would be competent.

Mr. THATCHER.—I think it might be as against Mr. Thane, were he claiming any interest.

The COURT.—It will be admitted then as against Mr. Thane.

WITNESS.—(Contg.) And he said he is not getting along very well; he said I could probably introduce him to people in the street who would be interested in this thing, but the trouble with Taylor is he wants other people to put up the money and himself to keep the control.

Mr. COOKE.—(Q.) Now you have already testified to this time, along the last of May in Lovelock, and Mr. Taylor and Mr. Jackson, and going out to the mine and going down in the mine with Mr. Jackson, and Mr. Taylor remaining up on the surface? A. Yes, he stayed on top.

Q. Do you know why he didn't go down the mine?

A. He said he wasn't interested, he had Bancroft's report, and he was going to stand on it.

Q. After you and Mr. Jackson had come out of

(Testimony of C. W. Poole.)

the mine and rejoined Mr. Taylor, you then returned to Lovelock? A. Yes.

Q. Just before starting for the mine, when you were at Lovelock, what if any conversation did you have with Mr. Taylor with reference to the Bancroft report not being favorable, do you recall whether that subject was discussed or not?

A. Yes, it was discussed.

Q. In the presence of whom and by whom?

A. It was discussed in the presence of Mr. Jackson by Mr. Taylor [400—395] and myself.

Q. What did Mr. Taylor say at that time about the report?

A. I met Mr. Taylor and Mr. Jackson on the street just before noon, probably half an hour before noon, that is the first I had seen of them in Lovelock; and Mr. Taylor's first words to me, as I recall it, were "Bancroft's report is unfavorable," and I said "What"? He said "Yes, his report is unfavorable." "Well," I said, "how do you reconcile that with the telegram that you sent me that it was favorable"? "Well," he says, "his first report was a preliminary estimate of tonnage, and he didn't have his assays, and the tonnage report was favorable"; "Well," I said, "how do you reconcile it with the telegram you sent to Thane"? Thane had given me a copy of that in which he reported 40,000 tons; I told him I didn't think Bancroft would make an exact statement of 40,000 tons; I don't recall any answer that Mr. Taylor ever made to that.

(Testimony of C. W. Poole.)

Q. In that conversation, or any conversation that you had with Mr. Taylor in the presence of Mr. Jackson, or otherwise, at this time in Lovelock, was anything said with regard to Morrin having lied to you? A. No.

Q. Did that subject come up as to the tonnage in the mine?

A. No; the question came up in that conversation about the report and I asked Mr. Taylor for the report, and he said he didn't have the report.

Q. That is the Bancroft report you are talking about?

A. Yes, his second report; and that is when he showed me the map on which these assays are plotted I have heretofore discussed; it was on the third level north, and between the fourth and fifth levels in the mine; and the question came up as to when Mr. Taylor had gotten these assays, and he told me that he had gotten them the same day, which conflicted with another letter which I had in my [401—396] pocket at that time, which had just been handed me, and led me to believe that he was going through with the deal.

Q. Is this when you were talking to him?

A. Yes; so then I flashed this letter on him, and I said "How do you reconcile this then"? and he didn't say anything; and I said, "Taylor, it occurs to me you are lying about these things; have you got the money to go through with this deal"? and then is when he told me he expected to put so much money in himself, and so much money his father

(Testimony of C. W. Poole.)

intended to put in, and so much Brown would put in, but that Mr. Brown and Mr. Brunton would probably visit the property.

Q. In conversation at any time, either before you got to the mine or after you returned from the mine, at Lovelock, did Mr. Taylor say anything to you with regard to communicating to your associates that the Bancroft report was unfavorable, as he stated to you?

A. In Lovelock when he first told me that the report was unfavorable, I said "Well, how do the rest of the men feel about this"? and he said, "I haven't told them, and I don't want you to tell them."

Q. The rest of what men?

A. That is my associates in the Nevada Humboldt. And I said, "What is the idea of not telling them"? "Well," he says "I want to go down to San Francisco and arrange a new deal, and if they knew that I am not going through with this deal, why, they probably won't go," and he says, "I think I can deal with them better in San Francisco than I can here."

Q. Is that all that was said upon that?

A. Well, he asked me to arrange an interview for him with J. T. Goodin of the First National Bank there, and he says "You owe Goodin money, don't you"? I said "Yes, we owe money," "Well," he says, [402—397] I want to see Goodin, and have him come to San Francisco, and if these fellows get obstreperous, he can put the screws to them."

(Testimony of C. W. Poole.)

Q. You are relating now what he said as nearly as you can recall it. A. Yes.

Q. You answered a question asked by Mr. Wheeler as to your not having been down in this mine from January 1, 1919, I think it was to April 2, 1919, is that correct; that you had not been down in the mine during that period?

A. From January the first, no, it was after Mr. Bancroft had been there and made his first examination.

Q. Then the fact is that you had not been down in the mine from the time Mr. Bancroft completed his first examination in January down to April 2d, when you were in Denver? A. Yes.

Q. Where were you engaged during that period?

A. I was superintendent of the Rochester Mines Company.

Q. You say you had not been down in the mine during this period. What about your giving your attention to the business by way of going to the property and looking over the surface, and occupying your time in that way?

A. I was not at the property.

Q. You were not at the property, either down in the mine or at the surface? A. No.

Q. In this conversation that you had with Mr. Taylor prior to the making of the contract of April 2d at Denver, did he say anything to you, or Mr. Murrish or Mr. Nenzel in your presence, as to why he wanted this data of development work?

A. Yes, he said he wanted it to give to Mr. Ban-

(Testimony of C. W. Poole.)

croft to induce Mr. Bancroft to make an examination; he told us previously he was trying to get Mr. Bancroft to do it, and he would not do it.

The COURT.—He has already testified to that once.

Mr. COOKE.—(Q.) With reference to this trip to San Francisco, [403—398] June 1st or 2d, along there, did you ever have any other business down in San Francisco at that time, aside from a business interview with Mr. Taylor?

A. The main business was to see our creditors.

Q. Had a meeting been called for the creditors in San Francisco about that time, do you know?

A. Well, it had not been called prior to going, but I told my associates what Mr. Taylor had said about putting the screws to us, and we discussed it pro and con, and decided we would have to—

Mr. THATCHER.—I move to strike out what he told his associates.

The COURT.—It may go out.

Mr. COOKE.—I don't care anything about that. (Q.) When was it arranged to have the creditors' meeting?

A. After we arrived in San Francisco, some time the early part of June.

Q. When was it finally decided between you and your associates to go down there and arrange with the creditors, how long before you started out?

A. I don't understand the question.

(The reporter reads the question.)

Mr. COOKE.—(Q.) Started out to San Francisco.

(Testimony of C. W. Poole.)

A. I think we started out on Saturday night, and it was Wednesday when we decided definitely to send out the notices.

Q. Calling your attention to the date about May 20, 1919, in New York City, do you recall having a conversation with Mr. Taylor there with reference to an advance, or possible advance by him on account of the concentrates, of some \$20,000, or thereabouts? A. Yes, he—

Mr. THATCHER.—Just a minute. You can answer that yes or no.

Mr. COOKE.—All right. (Q.) You say you do recall it? A. Yes.

Q. Go ahead and tell us what was said?

Mr. THATCHER.—Object as incompetent, irrelevant and immaterial and if it be an impeaching question no proper foundation has been [404—399] laid in either the statement to Mr. Taylor of the conversation, or the time, place, or persons present.

The COURT.—That is not necessary when you are attempting to impeach one of the parties, is it?

Mr. COOKE.—I think it is a declaration against interest, also.

The COURT.—I think I will allow the question.

A. Well, the substance of what was said was that Mr. Taylor said he could not make any more advances on the concentrates until he got Mr. Bancroft's report.

Mr. COOKE.—(Q.) Well, what report do you refer to? A. I refer to the—

(Testimony of C. W. Poole.)

Mr. THATCHER.—Object as calling for the conclusion of the witness; let him state the conversation.

The COURT.—He may state what Mr. Taylor said.

Mr. COOKE.—(Q.) Did Mr. Taylor say anything about what report he was expecting?

A. No, he didn't say what report he was expecting.

Q. Tell us just what he said, as nearly as you can recall.

A. As nearly as I can recall it, he said that he would not make any more advances of money on concentrates, until he got Mr. Bancroft's report.

Mr. COOKE.—I think that is all.

Cross-examination.

Mr. THATCHER.—(Q.) You are a mining engineer, Mr. Poole? A. Not by degree, no.

Q. You have been practicing mining engineering, as a matter of fact, for a number of years, have you not? A. Yes.

Q. Been acting as the manager or superintendent of mines, have you? A. I have.

Q. And for how long a period? [405—400]

A. Sixteen or seventeen years, nearly seventeen.

Q. And was that an active management of mining property? A. Was it an active management?

Q. Yes. A. Part of the time it was.

Q. Will you tell us of what mines you have acted as superintendent during that period?

A. Will I tell you?

(Testimony of C. W. Poole.)

Q. Yes. A. Yes.

Q. Go ahead and say what they were.

A. I acted as superintendent of the Oregon Idaho Gold Mines Company up in Lehigh County, Idaho.

Q. How long ago?

A. That was a short period, and early in my career, I can't recall that positively.

Q. What was the next property you had in charge?

A. The next property I had charge of was the Consolidated Murcur Gold Mines Company in Utah.

Q. About when was that?

A. That was right after the panic of 1907, and down to 1912, I think, four or five years in there.

Q. And what other properties; just give the names of them and approximately the length of time.

A. Well, the Rochester Mines, and the Rochester Combined Mines, the Seven Troughs Mining Company; I think that is the list of the properties that I had active charge of.

Q. The Seven Troughs property was controlled by Mr. Friedman was it not?

A. Not at the time I had charge of it.

Q. Was it controlled by him at any time that you were in charge?

A. It had been before I went there.

Q. And the Combined Rochester, was Mr. Friedman associated in that property? A. Yes.

Q. And was he an officer during the time you were in charge?

A. Well, I was consulting engineer of the prop-

(Testimony of C. W. Poole.)

erty, I was not superintendent. [406—401]

Q. You were consulting engineer? A. Yes.

Q. And the Rochester Mines Company, what position did you hold with that?

A. I was superintendent there, general superintendent.

Q. And in your duties as general superintendent, did you also act as consulting engineer, or engineer in charge? A. Yes.

Q. At Rochester? A. Yes.

Q. You didn't have any other engineer during that time?

A. I had another engineer under me.

Q. Under you. Coming to the Nevada Humboldt, what relation did you have with that company at that time, or at any time? A. At any time?

Q. Yes.

A. My first relation with the Nevada Humboldt was strictly that of a business relation; I was interested in the venture.

Q. You owned stock in it, did you? A. Yes.

Q. As a matter of fact, the Nevada Humboldt was rather a close corporation, was it not? A. Yes.

Q. And consisted generally of those who were associated closely to Mr. Friedman, did it not?

A. Yes.

Q. What other relation did you have with the Nevada Humboldt? A. What other relation?

Q. Yes.

A. Well, up until January the 31st, 1918, by virtue of a contract that I had with Mr. Friedman, I

(Testimony of C. W. Poole.)

acted as consulting engineer for that property, because my contract called for my acting as consulting engineer of all properties of which he had control, and he did have control of the—

Q. (Intg.) Have you that contract?

A. A copy of it.

Q. Is it in writing? A. Yes.

Q. Will you give me a copy of it before to-morrow morning?

Mr. COOKE.—You can have it now if you want it.

Mr. THATCHER.—Give it to me now. (Paper handed to counsel for plaintiff.) [407—402]

Q. Now after the first of January what relation did you have to the Nevada Humboldt Tungsten property? A. That of a stockholder.

Q. Nothing else? A. Nothing else.

Q. Did you have anything to do, or did you lay out any of the plans of development in the property?

A. No, Mr. Bancroft laid those out.

Q. Well, between the time of the first of January and the time that Mr. Bancroft made his report, who laid out the plans?

A. Well, from the first of January until he made his report I never went to the property.

A. After Mr. Bancroft went on there he laid out the plans? A. Yes.

Q. Did you examine that plan of development?

A. Yes, I did.

Q. Did you state that was a proper plan of development; did you approve it, in other words?

(Testimony of C. W. Poole.)

A. I told Mr. Bancroft I thought that was a satisfactory plan.

Q. You thought it was a satisfactory plan?

A. Yes.

Q. Did you wire Mr. Taylor, telling him that you had seen Mr. Bancroft's plan of development, or heard of it, and that you approved it? A. Yes.

Q. Did you state to any other members, directors, or officers of the company that you approved Mr. Bancroft's method of development?

A. I don't know that I did; I probably did, but I could not say certainly.

Q. Did you discuss Mr. Bancroft's plan with any of the directors or officers of the company?

A. Yes, I think I did.

Q. Did you discuss it with Mr. Morrin?

A. I discussed it in a great detail with Mr. Morrin, yes.

Q. You did? A. Yes.

Q. How great detail, went over it very carefully, did you?

A. Yes. Well, the report which I had in mind has never been [408—403] brought in evidence here; it is a report made out by Mr. Morrin and Mr. Bancroft, in which they attempted to show me that by producing scheelite strictly for development work they would not very much increase the cost per unit; it is cheaper, as all mining engineers know, to stope rather than drift; raise and sink, and Mr. Bancroft's plan contemplated almost exclusively, drifting and raising, and no stoping, and must

(Testimony of C. W. Poole.)

necessarily raise the cost of producing scheelite; he knew I was interested in producing scheelite as cheaply as possible to liquidate our debts.

Q. Who first told you of Mr. Bancroft's plan of development?

A. I think Mr. Bancroft called me up from the Nevada Humboldt mine and I was in Rochester at the time.

Q. Did Mr. Morrin ever call it to your attention?

A. No, he did not call it to my attention; he was there when I arrived at the mine, and Mr. Bancroft and I and Mr. Morrin discussed it all at the same time.

Q. All at the same time? A. Yes.

Q. Did you at any time instruct Mr. Morrin what he should do on the property, or how it should be developed? A. Did I instruct him?

Q. Yes. A. I don't know that I did.

Q. Didn't you as a matter of fact, generally give Mr. Morrin instructions as to how the development work should be carried out?

A. I certainly did not, never after the first of January.

Q. Never after the first of January?

A. No, that was not my business after the first of January.

Q. How many times did you visit the mine after the first of January?

Mr. COOKE.—During what period?

Mr. THATCHER.—After the first of January, 1919, up to the first of June, 1919. [409—404]

(Testimony of C. W. Poole.)

A. Here is the way I recall; my recollection is when we came from San Francisco, that I went to the property with Mr. Bancroft purely out of courtesy, that he and I had no discussions, and I didn't show him anything at that time, because he had already been over the property; however, I am doubtful of that point; I certainly went there a few days later, but my next recollection of having been in the mine was April the 9th; my next recollection is going down the mine with Mr. Taylor at the time of his visit; and my next recollection is going down with Mr. Jackson.

Q. Did you receive a telegram from Mr. Taylor to meet him and go to the mine with him?

A. Did I?

Q. Yes.

A. No, I didn't; Mr. Taylor is not in the habit of corresponding with me.

Q. Well, how did you know that Mr. Taylor was coming? Did Mr. Nenzel, Mr. Friedman, or any of them, inform you that he was coming out to look at the property.

A. Some of them must have informed me.

Mr. COOKE.—I move to strike that as not responsive.

Mr. THATCHER.—I want to know how.

Mr. COOKE.—I don't object to the question, but to the answer, argumentative, and must be.

Mr. THATCHER.—(Q.) Don't you recollect as a fact that either Mr. Friedman or Mr. Nenzel told

(Testimony of C. W. Poole.)

you to go out to the mine with Mr. Taylor, that Mr. Taylor was coming, and to go out with him?

A. My best recollection is that at the time Mr. Taylor came there I was in Tonopah, and I received a telegram from some one, I can't be positive who.

Q. Have you that telegram? A. No, I haven't.

Q. Your best recollection is you received a telegram from some one, either Mr. Murrish, Mr. Nenzel, or Mr. Friedman, informing you that Mr. Taylor was coming to visit the mine, and asking you to [410—405] return home, is that correct?

A. Yes, that is my best recollection.

Q. Your statement is, then, that you had only visited the mine three times from the first of January until the middle of April, is that correct?

A. I say that I—

Q. (Intg.) Give us the exact dates from the first of January, or the 16th of January, to the first of June of all of the times that you visited the mine?

A. All right. I may have gone direct to the property with Mr. Bancroft after the January 16th contract was signed, I am not certain; I am certain that I was at the mine a few days subsequent, that I am positive of; I am positive that I was not in that mine again until April 9th; I am positive that I was not in it from April the 9th until the latter part of April, when Mr. Taylor came there; and then I certainly was not in it from that on until I went down with Mr. Jackson.

Q. While in New York what were you doing?

(Testimony of C. W. Poole.)

A. What was I doing?

Q. Yes.

A. My prime object was to see Mr. Taylor and Mr. Thane.

Q. What else were you doing while you were in New York, or in the East?

A. While I was East I went to Washington.

Q. What were you doing in Washington?

A. My idea was to—

Q. What were you doing in Washington, I don't care what your idea was?

A. I was finding out how you presented a claim to the War Minerals Relief Commission.

Q. What kind of a claim?

A. What kind of a claim?

Q. Yes.

A. A claim for relief under the War Minerals Relief bill.

Q. Tungsten mine, is that what you were talking about?

Mr. COOKE.—Objected to as not cross-examination.

The COURT.—It seems to me that objection is good. [411—406]

Mr. THATCHER.—(Q.) Weren't you in Washington all of this time for the purpose of presenting a claim from the Nevada Humboldt Tungsten Company to the War Relief Board or War Metals Relief Board? A. No, I was not.

Mr. COOKE.—Objected to as not cross-examination.

(Testimony of C. W. Poole.)

The COURT.—I don't think it is cross-examination, Mr. Thatcher. It may go out.

Mr. THATCHER.—(Q.) Did you not in fact, while you were there, present on behalf of the Nevada Humboldt Tungsten Mines Company its claim against the Government for relief? A. I did not.

Mr. COOKE.—Objected as not cross-examination, incompetent and irrelevant from any aspect.

Mr. THATCHER.—Don't answer until counsel has an opportunity to object. My reason for presenting this, if your Honor please, is to show his relation to the company, which has been denied, and which he has denied here on the witness stand; and he has testified that he was not connected with the company except as a stockholder. I don't know just exactly what his relation was, but it seems to me that he had some relation.

Mr. COOKE.—I submit this would not show any particular relation.

The COURT.—Well, granting that he answers the questions in the affirmative, which you have propounded, would that help you as to conditions in Lovelock, and his knowledge of the mine, and that he was acquainted with the underground working?

Mr. THATCHER.—It seems to me that it would, if the Court please, because I will show by further questions that a man in order to make a presentation to the Government, or War Relief Board, would have to be familiar with a certain amount of detail; but I will let that line of examination go

(Testimony of C. W. Poole.)

for the time being, and ask leave of the Court to ask the questions a little later. [412—407]

Q. You went to Denver and arrived there some time about the 30th of March, Mr. Poole?

A. Yes, the 30th of March.

Q. My recollection is that you stated that you went there in response to the correspondence had with Mr. Taylor, is that correct?

A. No, I hadn't had any correspondence with Mr. Taylor.

Q. No, you hadn't had any, but you stated that you went on there in response to some correspondence that Mr. Taylor had had with Mr. Murrish, Mr. Nenzel and Mr. Friedman?

A. Yes, they told me he wanted us back there.

Q. You went over the correspondence that had taken place between the parties, did you, before they left? A. No.

Q. Did they tell you what was in it?

A. Told me in substance what was in it.

Q. What did they tell you of the purpose or object?

A. They told me Mr. Taylor wanted a new deal on some basis of paying the debts and giving stock.

Q. Did you go over any of the correspondence at all, read any of it?

A. I don't recollect that I did; I don't think I did.

Q. Would you say that you did not?

A. Yes, I would say that I did not.

Q. Now you had a power of attorney when you went on there, did you not? A. Yes.

(Testimony of C. W. Poole.)

Q. And whose power of attorney was that?

A. John Huntington.

Q. Did you have any other? A. No.

Q. How did you come to get that power of attorney?

Mr. COOKE.—Objected to as incompetent, irrelevant and immaterial; it makes no difference how he got it, if he got it.

Mr. WHEELER.—Object to it also on the ground it is not cross-examination.

Mr. THATCHER.—It is cross-examination, if the Court please, or it will be. [413—408]

The COURT.—What is the purpose of it?

Mr. THATCHER.—I don't like to state.

The COURT.—Go on and ask your questions, and if they are not all right they will be stricken out.

Mr. THATCHER.—(Q.) How did you come to get this power of attorney?

A. He gave it to me.

Q. Did you go around and ask him for it?

A. I did not.

Q. Do you know who drew that power of attorney? A. I think Mr. Murrish drew it.

Q. You think Mr. Murrish drew it?

A. I think so.

Q. Did you take it around to Mr. Huntington to have him sign it, or did Mr. Murrish do that?

A. I could not say, Mr. Huntington gave it to me.

Q. Mr. Huntington brought it to you? A. Yes.

(Testimony of C. W. Poole.)

Q. Did you have before you left for Denver—

A. (Intg.) Did I have it?

Q. Wait just a minute. Before you left for Denver did you, Mr. Murrish, Mr. Huntington, Mr. Nenzel, Mr. Friedman, and the other stockholders have a conference with reference to going to Denver on this matter; did you have any meeting for that purpose? A. No.

Q. Not that you were at? A. No.

Q. Mr. Huntington just walked up and handed you this power of attorney, and you walked on to Denver, or took the train to Denver; is that correct? A. No.

Q. What was the fact?

A. Mr. Huntington knew as well as I did that there was going to be a conference in Denver; he got his information that there was going to be from me.

Q. From you?

A. Yes; I sent Mr. Huntington out to the mine to make those surveys which appear on this plat, and when Mr. Huntington [414—409] came back he executed that power of attorney; he came back to Lovelock from his survey and while there executed that power of attorney and handed it to me.

Mr. WHEELER.—(Q.) This map Exhibit “Y”?

A. I mean our big map sir.

Mr. WHEELER.—That is Exhibit “Y.”

Mr. THATCHER.—(Q.) Do you know who drew the other powers of attorney that were signed?

(Testimony of C. W. Poole.)

A. I think Mr. Murrish did, he was accustomed to doing all that work.

Q. He did all that work of that kind for the crowd, is that right?

A. As long as I had anything to do with it.

Q. Mr. Murrish is an attorney, is he?

A. Is he an attorney?

Q. Yes.

A. Yes, I think he is, I am sure he is.

Q. Who paid the expenses of your trips to Denver?

Mr. COOKE.—If that is all the testimony on the powers of attorney, I move to strike it out as incompetent, irrelevant and immaterial, and not cross-examination.

The COURT.—Is all your purpose now disclosed?

Mr. THATCHER.—As far as that part is concerned it is if the Court please.

The COURT.—I do not see that that is cross-examination.

Mr. THATCHER.—Well I want to show why he testified that he went on there in response to certain correspondence which had taken place between himself and Mr. Taylor; I want to show what that correspondence was, how much he knew of it, and how much his principal, Mr. Huntington, knew of it.

The COURT.—Then that portion of his testimony may remain, in which he tells of seeing or knowing what the correspondence was; but that in reference to the powers of attorney I don't think is cross-examination. [415—410]

(Testimony of C. W. Poole.)

Mr. THATCHER.—May that portion also remain in which he states that Mr. Huntington knew what the situation was, and gave him the power of attorney?

The COURT.—I will let that stand, and the remainder will go out.

Mr. THATCHER.—I would like to have this marked for identification, if the Court please; this is the contract between Mr. Friedman and C. W. Poole.

(The contract is marked Plaintiff's Exhibit 48 for identification.)

Mr. THATCHER.—If the Court please, I am just about at a stage to commence a new portion of the cross-examination, and if there is no objection I would like to take a recess at this time.

(At 4:20 o'clock P. M. Court adjourns until tomorrow, September 21st, at 10 o'clock A. M.)

Tuesday, September 21st, 1920.

Court convened, 10 o'clock A. M.

Mr. WHEELER.—Mr. Thatcher, we called yesterday for certain papers and documents; have any of them been found?

Mr. THATCHER.—I have been looking for them, I think we have some; the others we have telegraphed to see if we can locate them.

Cross-examination of Mr. C. W. POOLE Resumed.

Mr. THATCHER.—(Q.) Mr. Poole, I understand you to say that you reviewed the correspondence, and went to Denver as a result of the cor-

(Testimony of C. W. Poole.)

respondence which took place between Mr. Taylor, Mr. Friedman, Mr. Nenzel and others?

A. Not that I reviewed the correspondence.

Q. Did you go over any of the correspondence?

A. I saw some of the correspondence.

Q. And do you recollect particularly that Mr. Taylor in a letter [416—411] to Mr. Friedman, which is here marked Plaintiff's Exhibit 12, suggested that if Mr. Friedman could not come on that he made the following suggestion; "if you cannot do this, would your stockholders be willing to have Nenzel, Murrish and Poole appointed as a joint committee to represent all of them in readjusting the option, as, I believe that after several days 'wrangling,' we could agree on some mutually satisfactory plan." Do you recollect that?

A. I don't recall that letter, no.

Q. Just take a look at it and see if you recollect. (Hands letter to witness.)

A. I don't recall having seen that letter.

Q. You don't recall having seen that letter?

A. No, I don't.

Q. Did you and Mr. Nenzel and Mr. Friedman, or any of you, discuss the question of sending a stockholders' committee or stockholders' pool on to see Mr. Taylor, to readjust the option?

A. No, we didn't discuss the matter at all.

Q. You didn't; how did you come to go to Denver?

A. Because Mr. Friedman told me Mr. Taylor wanted to arrange a new deal.

(Testimony of C. W. Poole.)

Q. Mr. Friedman did tell you that? A. Yes.

Q. Did anyone else tell you that?

A. I think Mr. Nenzel mentioned that fact, too.

Q. Did Mr. Murrish mention it also?

A. Not that I recall.

Q. At any rate, you did all go together?

A. Yes.

Q. And you did understand at that time that you were going there to readjust the option contract?

A. Yes.

Q. And you were going there as a stockholders' committee or pool, is that correct?

A. I don't understand what you mean by stockholders' committee or pool.

Q. Well, you went there to represent the balance of the stockholders [417—412] and yourself, did you not?

A. I went there to represent myself.

Q. And you also represented Mr. Huntington, too, did you not? A. Yes.

Q. And you arrived in Denver on what date?

A. Sunday about noon.

Q. Sunday about noon; and you left there on what date, Wednesday?

A. Wednesday, late in the afternoon, as I recall.

Q. My understanding is that during the first three days that you were there, or two days, on Sunday and Monday and Tuesday, you didn't discuss with Mr. Taylor any question of tonnages?

A. No.

(Testimony of C. W. Poole.)

Q. And you didn't discuss with Mr. Taylor during any part of that time the question of percentages or values of ore? A. Yes.

Q. When?

A. Sunday when I gave him the map, when I first arrived there.

Q. Then when you first arrived there on Sunday, you gave him the map, is that correct? A. Yes.

Q. And you did discuss with him at that time percentages of ore?

A. I presented that map, and explained every detail on that map when I presented it.

Q. When you refer to that map you mean Defendant's Exhibit "Y," your mine map, is that correct? A. Yes, that is the map.

Q. And you gave that to him on Sunday; and what percentages did you tell him, or what ores or percentages did you tell him were there at that time?

A. I told him that I hadn't had occasion to visit the mine, and that I had sent Mr. Huntington out there, and Mr. Huntington had brought that map up to date; and at the time that he had brought it up to date he had put certain estimates of values on there, Mr. Morrin and he, and that—

Q. Now— [418—413]

Mr. WHEELER.—Let the witness finish the answer.

Mr. THATCHER.—Go ahead. Did I interrupt you, were you through?

(Testimony of C. W. Poole.)

A. No, I wasn't through.

Q. Go on then.

A. And that he should not rely on those facts; I said, "I will vouch for these distances, because Mr. Huntington is an accurate surveyor, but as to these percentages, you must realize they are merely estimates, and not values."

Q. Then I understand that on Sunday you gave him the map, called his attention to these percentages and also to the distances which the works had been extended, as shown by Mr. Huntington?

A. Not the distances in feet, but merely that the map was correct.

Q. That the map was correct? A. Yes.

Q. Did you say anything to him with reference to distances at that time; did you use the word distances? A. No, I think not.

Q. On Sunday I am talking about?

A. No, I think not.

Q. Didn't you testify just a moment ago that you called his attention to the percentages on the map? A. Yes.

Q. And told him he should not rely upon them, but that he could safely rely on the distances because they were made by Mr. Huntington, who was a competent surveyor; didn't you just so testify?

A. I did. I would like to say I mean distances as graphically represented on the map, and not as figures.

Q. Not as figures, but the graphic representa-

(Testimony of C. W. Poole.)

tion of distances on there; and you told him on Sunday that he could rely on that, didn't you?

A. I certainly did.

Q. Now on Monday did you have any discussion with Mr. Taylor as to tonnages? A. I did not.

Q. Nothing was said about tonnages in the mine?

A. No.

Q. Or the amount of ore blocked out, developed, in sight or indicated? A. No.

Q. Was anything said on Sunday as to the amount of ore which was [419—414] blocked out, in sight, developed or indicated? A. No.

Q. Then as I understand it, neither on Sunday nor Monday was there any statement made as to the tonnage which was in the mine, indicated or otherwise? A. No.

Q. Now on Monday did you have any further discussion with Mr. Taylor as to percentages, or as to values of ore in the mine?

A. Not that I recall.

Q. On Tuesday did you have any discussion with Mr. Taylor as to tonnages in the mine? A. No.

Q. Was anything said by either you or Mr. Taylor on Tuesday as to whether or not there was any particular tonnage in sight in that mine?

A. No, there was not; Mr. Taylor—

Q. You can answer the question yes or no.

A. No.

Q. Then I understand you that on Tuesday there was no reference made to tonnages or to ore blocked out, developed, indicated or in sight?

(Testimony of C. W. Poole.)

A. Yes.

Q. Then there was no discussion of any kind whatsoever on Tuesday with reference to tonnages, is that right?

A. Yes, there was a discussion with reference to tonnages.

Q. On Tuesday? A. Certainly.

Q. What was the discussion on Tuesday with reference to tonnages?

A. Hypothetical tonnages that are in that prospectus.

Q. Tell what was said on Tuesday with reference to tonnages, between you and Mr. Taylor?

A. Mr. Taylor amplified that exhibit there.

Q. What exhibit?

A. I don't know the number of it.

Mr. WHEELER.—It is Defendant's Exhibit "B."

Mr. THATCHER.—(Q.) On Tuesday he amplified what?

A. He explained that prospectus to us.

Q. That prospectus, you mean Exhibit "B"?

A. I mean that, yes, sir. [420—415]

Q. That is what you mean? (Hands paper to witness.) A. Yes, sir.

Q. But at that time you didn't tell Mr. Taylor, on Tuesday, anything about any tonnages that were in the mine? A. I did not.

Q. You made no mention of tonnage at any time?

A. No.

Q. Then the only discussion or statement that

(Testimony of C. W. Poole.)

was made with reference to tonnages, is that which appears on Exhibit "B"; is that correct?

A. That is my recollection of it, yes, sir.

Q. And that was made by Mr. Taylor?

A. Yes.

Q. Not by you? A. No.

Q. Mr. Nenzel was present all of that time, was he, on Tuesday? A. Yes.

Q. Mr. Nenzel and Mr. Murrish were present at all times, at all meetings on Sunday, Monday and Tuesday; is that correct?

A. On Sunday, yes; on Monday, yes, except that Mr. Murrish was not there Monday afternoon; that has not been brought out in the testimony.

Q. Oh, Mr. Murrish was not there on Monday afternoon, is that right?

A. Yes, that is right; not all the time.

Q. He wasn't there all the time?

A. He came in late in the afternoon.

Q. Well, were you and Mr. Nenzel together all the time at all conversations with Mr. Taylor, to the best of your recollection?

A. Yes, I think so.

Q. That is your best recollection?

A. Yes, that is my best recollection.

Q. And that Mr. Murrish was out some of the time? A. Yes.

Q. Now on Wednesday when was the first conversation between yourself and Mr. Taylor with reference to tonnages?

(Testimony of C. W. Poole.)

A. It was after he and Mr. Murrish had arrived at some agreement [421—416] on the contract; that is, about the final drawing up of it; whether the contract had been dictated or not—

Q. (Intg.) And who was present then?

A. Who was present then?

Q. Yes. A. Mr. Nenzel.

Q. Yourself and Mr. Nenzel? A. Yes.

Q. Mr. Murrish was in the other room finishing up the contract?

A. He was either in the other room, or had left the building, I can't recall.

Q. Then my understanding is that there was never any discussion or statement by you with reference to tonnages, except Mr. Taylor's Exhibit "B," until after you had agreed upon the terms of the contract, and it was being dictated and prepared by Mr. Murrish; is that right?

A. The tonnages shown in Mr. Bancroft's report may have been discussed on Sunday, I can't say as to that.

Mr. THATCHER.—I move to strike it out as not responsive.

The COURT.—It may go out. Read the question.

(The reporter reads the question.)

The COURT.—That calls for a categorical answer.

Mr. THATCHER.—Read the question again.

(The reporter reads the question.)

Mr. COOKE.—I object to the question. Counsel

(Testimony of C. W. Poole.)

asks the witness as to what counsel's understanding is.

The COURT.—You may strike the word “understand” out.

(The reporter reads the question.)

WITNESS.—I don't understand what Taylor's Exhibit “B” means.

Mr. THATCHER.—All right, I will reframe the question; let me take it this way; (Q.) Is it a fact that there never was any discussion or statement by you with reference to tonnage in that mine until after you had agreed upon the terms of the contract, and it was in process of being dictated and typewritten? A. Yes. [422—417]

Q. Then Mr. Taylor never asked you, and you never stated to him any amount of tonnage in that mine at any time until after you had agreed upon the terms of the contract, and it was being actually written; is that true? A. Yes.

Q. At that time who had your maps, did you have them? A. At that time, you mean?

Q. Yes.

A. They were in Mr. Taylor's office, down there.

Q. They were in Mr. Taylor's office at that time?

A. Yes.

Q. How many maps did you have?

A. Six or seven.

Q. Where are they? A. They are here.

Mr. THATCHER.—Will you produce them for our inspection.

(The maps are handed to counsel for plaintiff.)

(Testimony of C. W. Poole.)

Q. These other maps which your counsel has handed me are maps which you took on at that time? A. Yes.

Q. I call your attention again to Defendant's Exhibit "Y," and ask you if that is a map you had at that time? A. It is.

Q. And is that the map which you said you used in the conversations and statements with Mr. Taylor, when you were fixing up or putting down upon the photostat map various data and details which you testified to yesterday?

A. That is the map with the change that I specified, yes.

Q. Will you state what pencil marks were not on this map at that time; read them?

A. 9250. 4200. 2048. 1080. 4860. That is all I see that weren't on there.

Q. They were not on there at that time?

A. No.

Q. Then I understand you to say that in the left-hand corner of the map the words "cut" and "ore." "Ore in cut, 2%," was that on there? A. Yes.

Q. And in the same block, which corresponds to block "M" in Mr. [423—418] Bancroft's report, Exhibit 15, there are also the figures "Average width 5 feet ore three-quarters one per cent"; was that there when you took this map to Denver?

A. Yes, that was there.

Q. Now calling your attention to the right-hand side of the map, and what would correspond with block "N," was there on that map at the time you

(Testimony of C. W. Poole.)

took it to Denver, "Average width 8 feet, two per cent ore"? A. Yes.

Q. Calling your attention to the words just used, "Average width 8 feet, two per cent ore," what is that supposed to represent?

A. What was it supposed to represent?

Q. Yes.

A. It is supposed to represent Mr. Morrin's estimate which he gave to Mr. Huntington.

Q. Well, using the figures, does not that mean that the extension of that drift which runs under block "N," would have an average width of 8 feet, and run two per cent in tungsten; is not that what it is supposed to mean? A. It could mean that.

Q. Well, isn't that what it is intended to mean?

A. No, it is not what it is intended to mean.

Q. What does it mean?

A. It means Huntington put that on there as his estimate.

Q. His estimate of what?

A. His estimate of what he thought was down there; he was making it in the office.

Q. His estimate of what he thought was down there? A. Yes.

Q. What workings would that refer to?

A. Refer to these workings here represented.

Q. And would it refer to the extension of that drift under block "N"? A. Would it?

Q. Yes, did it refer to it?

A. Well, I can't say positively, because there may have been some stoping area about that.

(Testimony of C. W. Poole.)

Q. Do you know whether there was any stoping area above that? [424—419]

A. I don't think there was, but there may have been.

Q. Don't you know there was no stoping area above that level in block "N," up to date?

A. No, I don't.

Q. You don't? A. No.

Q. Calling your attention to the words "Average width 5 feet ore three-quarters of one per cent," what does that mean—which is in what would correspond with block "M" in the Bancroft report, Exhibit 15. A. Well, it means just what it says.

Q. Can you explain it for the benefit of the record?

A. I would say that that was meant to mean that the average width of that drift there was five feet, and that the estimated value of it was three-quarters of one per cent.

Q. That is what I wanted to know.

Mr. WHEELER.—(Q.) Three-quarters of one per cent? A. Yes.

Mr. THATCHER.—(Q.) Now coming down—these levels are not numbered on this map, are they? A. No.

Mr. THATCHER.—Do you object to these being numbered for the purpose of identification?

Mr. WHEELER.—Not at all.

Mr. THATCHER.—(Q.) Mr. Poole, will you now use a blue pencil and mark this block in the right-hand corner of the map "N"?

(Testimony of C. W. Poole.)

A. Yes. (Witness marks on the map as requested.)

Q. And mark the block beyond the granite dike, "M."

(Witness marks the point on the map.)

Q. Will you also number the levels in the mine as numbered by the Bancroft map. Take the shaft level—the level from the shaft; just number it right in the middle of the shaft; that will be 1, 2, 3.

(The witness marks the numbers of the levels on the map.)

Q. Mr. Poole, calling your attention to exhibit "Y," and Plaintiff's Exhibit 15, particularly to plate 5, why do they appear different, appear to be reversed? [425—420]

A. Well, this is assumed as looking north; Exhibit "Y" is assumed as looking northwest, and this is assumed as looking southwest.

Q. In other words, one is a footwall plate and the other is a hanging-wall plate; is that correct?

A. Yes.

Q. Now coming down to level number one, shaft level number one, you have already called our attention to the marks that were on the map at that time? A. Yes.

Q. In block "M," just out from level number 1, from the shaft, are the figures 9250, when were they put on? A. I don't know.

Q. You don't know? A. No, I do not.

(Testimony of C. W. Poole.)

Q. You haven't any idea as to when those figures 9250 were put on?

A. I can make a guess; I think they were put on on Wednesday in Denver; I am not positive because they are not my figures.

Q. Not your figures? A. No.

Mr. WHEELER.—(Q.) Were they or were they not on there when you took that map back to Denver?

A. They were not.

Mr. THATCHER.—(Q.) They were put on afterward, were they?

A. Yes.

Q. And this 4200 in block "N," when was that put on?

A. Well, it was put on after I took this map to Denver.

Q. It was after you got to Denver, it was not on there when you left Lovelock? A. No.

Q. It grew on some time between the time you left Lovelock and the time you got back?

A. I don't think it grew on there.

Q. Well, it got on there? A. Yes.

Q. Now calling your attention to level number two—is this south? A. Yes, that is south.

Q. Calling your attention to level number two south, beyond the fault plane, do you see any figures on there in pencil? A. Yes, I do. [426—421]

Q. What are they?

A. "One-half of one per cent low grade ore."

Q. Who put that on there?

(Testimony of C. W. Poole.)

A. John Huntington.

Q. Was it on there when you went to Denver?

A. It was.

Q. And when Mr. Taylor saw the map?

A. Yes.

Q. Calling your attention to level number two north, just above the drift, are there any figures there? A. Yes.

Q. Will you read them?

A. "Width 5 feet, 15 feet ore, one and one-half per cent."

Q. Who put those on there?

A. Mr. Huntington.

Q. Were they on there when you got to Denver?

A. They were.

Q. And they were shown to Mr. Taylor?

A. They were.

Q. Calling your attention to level number 3, are there any figures or letters on number three north?

A. Yes.

Q. What are they?

A. "Width 10 feet, one and one-half per cent ore."

Q. Width ten and one-half feet, one and one-half per cent ore?

A. Width 10 feet, one and one-half per cent ore.

Q. What does width 10 feet, one and one-half per cent ore mean? A. Mean with reference to this?

Q. Yes, with reference to number three drift? What does it mean so far as you know?

(Testimony of C. W. Poole.)

A. I would take that to mean the average width, myself, but it does not say it.

Q. Well, would not you take that to mean that it meant average width for 10 feet of one and one-half per cent tungsten ore; don't you so understand it?

A. No, I don't so understand it in face of these averages up here.

Q. Look at this and tell me what you understand by that?

A. I would say that represents—there must be some place on that level where there is ten feet of ore.

Q. Calling your attention to the south drift on the number three. [427—422]

A. Width 5 feet, one and one-half per cent.

Q. Now coming down to the next level, level number four, what figures do you find both north and south?

A. "North, width 8 feet, one and one-half per cent"; on the south drift, "width ten feet, two per cent."

Q. Were those widths and percentages on levels number 1, 2, 3, and 4, when you took this map to Denver? A. They were.

Q. And exhibited it to Mr. Taylor?

A. They were.

Q. There appears to be an extension of the number 3, both north and south from the shaft; when were those put on there? A. I don't know.

Q. Were they on there when you went to Denver?

(Testimony of C. W. Poole.)

A. No, they were not. The map was inked, all except this here, why that was not inked, I don't know.

Mr. WHEELER.—When you say “this” the record won't show what you mean.

A. Exhibit “Y.”

Q. You say “all except this here,” to what were you pointing?

A. That is the drift under block “N”; these extensions have been put on since.

Mr. COOKE.—You had better identify what extension you mean.

A. All other lead pencil extensions except the one under block “N.”

Mr. WHEELER.—(Q.) You say have been put on since the trip to Denver; is that right?

A. Yes, they have been put on since the trip to Denver.

Mr. THATCHER.—(Q.) Now were there any other lines on that map, lines or figures, at the time you took it to Denver?

A. No.

Q. Were there any others put on in Denver, except those you have mentioned? A. Yes.

Q. What were they?

A. Well, this construction line that goes from here up to here (indicating).

Mr. WHEELER.—(Q.) That is, from the fourth level to the first [428—423] level diagonally on the right side of the shaft?

(Testimony of C. W. Poole.)

A. Yes.

Mr. THATCHER.—(Q.) Now is that line distinct at this time, easily seen?

Mr. WHEELER.—I submit that is for the observation of the Court.

WITNESS.—I can see it easily; here it is. (Indicating on map.)

Mr. THATCHER.—(Q.) Now is there any other line on it?

A. There are several lines on it.

Q. Isn't it a fact that there is a line commencing below the fourth level in the shaft? A. Yes.

Q. And running diagonally up past the number 2, up to the end of the number 2 level?

A. Which line do you refer to?

Q. Right there. (Indicating on map.)

A. Well, that does not go from the bottom of the shaft.

Q. Below the bottom of the shaft?

A. No, it starts from the extension of the fourth level north.

Q. All right. Commencing at the end of the drift on the fourth level north, is not there a line, which runs up to the extension of the number 3 north, and thence up to the number 2 north?

A. Yes.

Q. And is not that line also extended then vertically to the number one north? A. Yes.

Q. And that can be seen on the map, can it not?

A. It certainly can.

(Testimony of C. W. Poole.)

Mr. THATCHER.—Can your Honor see that?

The COURT.—No.

WITNESS.—They are simply construction lines, and they are put on real faintly in the first place so as not to mar the map.

Mr. THATCHER.—(Q.) Will you just slightly below those lines trace them out with a blue lead pencil which I hand you, just [429—424] enough below them so as to keep the original line intact on that map; take all of those lines on the south.

Mr. COOKE.—I take it that is simply for the purpose of making it more easily seen?

Mr. THATCHER.—Easily seen and referred to.

WITNESS.—You want me to trace those lines?

Mr. WHEELER.—Without obliterating the original lines.

(Witness traces lines on the map as requested.)

Mr. THATCHER.—(Q.) Below the fourth level, running from the shaft up to the number 4 north, there is a line which appears to have been erased, is there not?

A. Yes.

Q. Trace that lightly, or just below it, with blue pencil.

(The witness traces the line on the map as requested.)

Q. Now coming to the south side of the map, what lines are shown?

(The witness traces the lines on the map with blue pencil.)

(Testimony of C. W. Poole.)

WITNESS.—Here are two pencil lines.

Q. Those two pencil lines clearly indicated are nothing more or less than the extension of the fault plane? A. Yes.

Q. Now you have indicated by using the blue pencil, lines which can be traced upon that map; do you know when those lines were put on there?

A. Do I know?

Q. Yes. A. No, I don't.

Q. Were they on there when you were in Denver?

A. Well, these lines certainly were not.

Mr. WHEELER.—These lines are what?

Mr. THATCHER.—(Q.) When you say this line, do you mean one from the number 2, end of the number 2 north drift, downward to the end of the number 4 drift?

A. Well, downward to the end of the number 3, thence downward to the end of the number 4. [430—425]

Q. That was not on the map when you went to Denver? A. No.

Q. Do you know when it got there?

A. Well, I don't know positively; I have my opinion.

Q. Well, I know; did you put it on there?

A. No, I did not.

Q. You didn't put it on there? A. No.

Q. Do you think Mr. Nenzel put it on there?

A. No.

Q. Do you think Mr. Murrish put it on there?

(Testimony of C. W. Poole.)

A. No.

Q. And you know that you did not? A. I do.

Q. Calling your attention to Plaintiff's Exhibit 15, and to plate number 5, I call your attention to a line, a pencil line running from slightly below the fourth level to the extension of the number 4 north, thence diagonally to the number 2 north, or an extension thereof; do you observe that line?

A. Yes.

Q. How does that line compare with the blue line which you have just testified to be upon Exhibit "Y," which runs from the number 2 north, thence downward to the extension of the number 3, and thence to the end of the number 4?

A. They don't compare.

Q. Isn't it almost and doesn't it take in almost exactly the same area?

A. In no sense does it from an engineering standpoint; it runs from the bottom of the shaft, and the other is an extension from the number 4 level, and a later date.

Q. Is not there also on your Exhibit "Y" a line which runs from a point about half way?

A. It starts from a point half way, and runs downward, yes.

Q. Is not there a line about forty feet, commencing at a point about forty feet north in the drift on the number 4 level, that runs down toward the bottom of the shaft, diagonally?

A. No, it does not run toward the bottom of the shaft; it runs through the shaft.

(Testimony of C. W. Poole.)

Mr. WHEELER.—Exhibit “Y” now? [431—426]

A. Yes. This is the shaft (indicating); this line runs through it, and apparently intersects another line to the south of the shaft there.

Mr. THATCHER.—(Q.) Let me ask you another question: How far out was the number 4 drift on April 2d? A. How far out?

Q. Were the number 4 drifts on April 2d.

Mr. WHEELER.—North or south?

Mr. THATCHER.—North and south, either way.

A. About fifteen feet.

Q. Each? A. Yes.

Q. They were each out about fifteen feet?

A. Yes.

Q. How far were they out on April the 17th?

A. I don't know.

Q. How far were they out at the time of Bancroft's second examination? A. I don't know.

Q. Do you know how far they are out now?

A. I do not.

Q. Have you been down in the number 4 drifts?

A. Yes.

Q. When were you last down there?

A. Last November.

Q. November, 1919? A. Yes, last year.

Q. How far were they out then?

A. I don't recall, they are out a considerable distance now.

Q. Well, how far are they out now, about?

(Testimony of C. W. Poole.)

A. Oh, 150 feet, I imagine, each way, 120 anyhow.

Q. One hundred and twenty? A. Yes.

Q. But you don't know how far they were out at the time of Bancroft's last report?

A. No, I wasn't at the mine then.

Q. Well, right after that you went up to the mine, didn't you, with Mr. Jackson? A. Yes.

Q. How far were they out then?

A. Well, I don't recall, I wasn't examining them very carefully; I went down that mine with one point in view.

Q. Yes, I know about that one point; didn't you look at the mine [432—427] workings at all, other than the shaft and the number 3 north?

A. I don't recall that we did.

Q. The only thing you had in mind when you went down the mine that time was to look at the number 3, and shaft? A. Yes.

Q. You didn't have anything else in view?

A. No.

Q. Why did you have that in view at the time you made the examination?

A. Because Mr. Taylor in Lovelock had shown me a map and on that map he had assays platted, and those assays were the assays which Mr. Bancroft had taken at his second examination.

Q. And those assays showed?

A. Those assays showed a very low grade ore, and Mr. Taylor had told me that Mr. Bancroft's report was unfavorable, and I was very much interested in

(Testimony of C. W. Poole.)

satisfying myself that they were what Mr. Taylor had told me; I doubted his credibility, and I wanted to assure myself that those assays were probably assays which he had gotten from Mr. Bancroft.

Q. And Mr. Taylor had assured you, told you or stated to you, that the number 3 north and the shaft were both low grade, or no values, according to Mr. Bancroft?

A. He told me nothing; he showed me this map.

Q. Did the map which he showed you, which purported to be from Mr. Bancroft, show that the number 3 north was valueless?

A. He had only a few assays—

Q. Can't you answer that question?

A. His assays showed me it was valueless.

Q. On the number 3 north?

A. Yes, but he had only a few of them.

Q. Just answer the question.

Mr. WHEELER.—Let the witness answer the question.

Mr. THATCHER.—I move to strike it out as not responsive. [433—428]

(The reporter reads the last question and answer.)

The COURT.—I think he is entitled to a categorical answer.

A. Yes, it did.

Mr. THATCHER.—(Q.) Did you ever see Mr. Bancroft's second report?

A. I never did.

Q. You have seen it since you have been in court here, have you? A. Not his report.

(Testimony of C. W. Poole.)

Q. Did you see his assay sheet and plat made of the second report?

A. I saw the big map, I didn't see the little map.

Q. I call your attention to Exhibit 19, and ask you to refer to the number 3 level north, and the assays thereon. (Hands to witness.)

A. One per cent. 4.66 feet, $2\frac{3}{4}\%$. $8\frac{1}{2}$ feet 1.15% 8 feet, 3.35%. 5.4 feet, 1.2%. 6 feet, 1.35%. 4.33 feet, 1.25 feet, 9.4 feet, $2/10$ of one per cent. 6.3 feet.

Q. You have read the assays that are on the number 3 north, have you?

A. I have not read them all yet.

Q. Go ahead.

A. 2.2% 4.66 feet. 1.25% 3.4 feet, none. 5.7 feet, $1/10$ of one per cent. 4.66 feet. That is all that I see.

Q. Mr. Poole, what was the average width and assay of that drift? A. What was the average?

Q. Yes, according to those assays.

Mr. WHEELER.—Object, if the Court please, on the ground it is not cross-examination.

WITNESS.—I can't average in my head.

Mr. THATCHER.—If the Court please, I think it is cross-examination. He has testified as to his purpose in going down there to investigate the number 3 north, and showing as not having any values, and having been so represented to him by Mr. Taylor and Mr. Bancroft, [434—429] or the result of Mr. Bancroft's examination, and I want to show what the actual value of that was.

(Testimony of C. W. Poole.)

The COURT.—Well, it is shown there, isn't it?

Mr. THATCHER.—It does not show the average.

The COURT.—Well, he can perform the calculation at recess, if he wishes to.

Mr. THATCHER.—(Q.) At the recess will you perform—

Mr. WHEELER.—(Intg.) The question will be objected to as irrelevant and incompetent, and not cross-examination. I would like to ask the witness in that connection if the number 3 level was in the same condition when the assays were taken by Mr. Bancroft, as it was on April the 2d?

Mr. THATCHER.—I object to that question.

Mr. WHEELER.—Some of these assays were taken a foot or two beyond where the assays were the 2d of April.

The COURT.—Didn't he testify in chief something about Mr. Bancroft's report, and that he was very much dissatisfied, and very much surprised, and he went into the mine to ascertain whether it was true or not?

Mr. WHEELER.—Only as to certain things; assays at certain points. As I understood the question it was what was the average assay value of this whole drift on the north side.

The COURT.—Is not this the Bancroft report?

Mr. WHEELER.—No, I think the witness was shown on a slip of paper a rough map, upon which certain assays were written; it does not appear that they were the same assays that appear here, and

(Testimony of C. W. Poole.)

that as to two points in the mine he was dissatisfied, and he went down and examined as to those two points, for the purpose of seeing whether those two assays were correct; he is now asked as to whether the averages on the whole drift were this, that or the other, what [435—430] they amounted to, and he is to make a calculation.

The COURT.—Well, this apparently is not the document that he saw at that time.

Mr. THATCHER.—No.

The COURT.—Well then, I think that is not cross-examination.

(A short recess is taken at this time.)

Mr. THATCHER.—(Q.) Your purpose in going down the mine at this time—I am speaking now at the time when Mr. Jackson and Mr. Taylor went to the mine in the latter part of May, I think it was May 30th—was to verify or check Mr. Bancroft's assays as reported to you by Mr. Taylor, in the shaft and in the number 3 drift? A. Yes, sir.

Q. No discussion at that time took place as to tonnage? A. No.

Q. Now on Sunday you said you discussed with Mr. Taylor percentages of value of the ore?

A. I discussed that Exhibit "Y" with the percentages shown on it.

Q. On Tuesday you didn't discuss any percentages; is that correct? A. No.

Q. Nor tonnage? A. No.

Q. Nor on Wednesday, until the contract was being dictated and drawn? A. Yes.

(Testimony of C. W. Poole.)

Q. And when Mr. Taylor came out to the mine in April, about the middle of April, did you discuss tonnages with him at that time? A. No.

Q. Did you discuss percentages or value of the ore? A. Oh, yes.

Q. Told him where they would run?

A. Where they would run?

Q. Yes, where they would assay?

A. If he asked us an estimate of a particular point, we gave him our idea of it.

Q. Gave him your idea at that time?

A. Yes. [436—431]

Q. My understanding is that never on any occasion did you discuss tonnages with Mr. Taylor, or make any statement as to tonnages, except the conversation that you had immediately preceding the signing of the contract?

A. Not with Mr. Taylor, no.

Q. That is the only time you ever talked tonnage?

A. Yes.

Q. Now, will you tell me what times, giving them as near as you can, you discussed percentages, just enumerate the times when you told Mr. Taylor anything about the ore in the mine, what it would run?

A. I discussed percentages with Mr. Taylor on my getting there in May, in Denver.

Q. On Sunday? A. On Sunday, yes.

Q. When next?

A. On Wednesday when we were using this map again for these calculations; and at the time of his

(Testimony of C. W. Poole.)

visit there the latter part of April, discussed it again.

Q. Did I understand you to say you had no discussion and made no statement to Mr. Taylor at any time as to the quantity of ore blocked out in that mine; you have never made any statement to Mr. Taylor as to the quantity of ore blocked out in that mine? A. I never have.

Q. On any occasion? A. On no occasion.

Q. Either before or since he entered into that contract? A. No.

Q. Now calling your attention to Exhibit "B," when was that prepared? A. I don't know.

Q. When did you first see it? A. In Denver.

Q. What day? A. Tuesday morning.

Mr. WHEELER.—April the first?

A. April 1st that would be, yes.

Mr. THATCHER.—(Q.) Saw it first Tuesday morning, April 1st? A. Yes.

Q. Where? A. In Mr. Taylor's office. [437—432]

Q. Who was present?

A. Mr. Taylor, Mr. Nenzel, Mr. Murrish and myself.

Q. And yourself; and to whom was it first presented?

A. I think he presented this to Mr. Murrish; we were all there.

Q. You were all there, but he presented it to Mr. Murrish? A. I think so.

Q. Wasn't he endeavoring to persuade Mr. Mur-

(Testimony of C. W. Poole.)

rish to sign the contract or to make a deal on this property when he presented that?

A. Yes, I think that was part of his purpose.

Q. Didn't he use the figures there for the purpose of persuading Mr. Murrish to come in on the contract? A. Yes, he did.

Q. And didn't he also argue with Mr. Murrish by so doing the stock that would be left to Mr. Murrish and the other stockholders would be of more value than if he went through with the original option; was that argument advanced by him?

A. Well, Mr. Taylor assumed that—

Q. (Intg.) Just answer the question.

A. Was that argument advanced there?

Q. Yes. A. It was advanced, yes.

Q. To Mr. Murrish? A. To all of us.

Q. Was it addressed particularly to Mr. Murrish?

A. Yes.

Q. Why? A. Why?

Q. Yes.

A. Because Mr. Murrish was adverse to any deal, as I understood him.

Q. Mr. Murrish was adverse to any deal at that time? A. Yes.

Q. Do you know why Mr. Murrish was holding out on the deal?

A. I think there were two reasons.

Q. What were they, if you recollect?

A. Mr. Murrish felt quite confident if Mr. Taylor didn't exercise his option that we could get some one

(Testimony of C. W. Poole.)

else who would be interested in the property [438—433]

Q. What was the other reason?

A. I think that was a personal reason.

Q. What was the reason?

A. Well, he figured that Mr. Friedman might enlarge his interest in the property if he would consent to a deal.

Q. Isn't it a fact that Mr. Murrish insisted at that time that Mr. Nenzel exercise his power of attorney, and turn over to him a hundred thousand shares of stock? A. It is not.

Q. Didn't he insist on getting some stock which he contended was due him from Mr. Friedman?

A. No, he did not.

Q. Not at that time? A. No, he did not.

Q. You didn't hear such a statement made at any time during the conversation?

A. Any such a statement as you have made? No.

Q. What was the statement, tell the exact facts.

A. Mr. Murrish told Mr. Friedman before he left Lovelock that he would not consent to any deal which reduced his interest in that property less than one-half; that is, he would not give up to Mr. Taylor more than one-half of his holdings in consideration of Mr. Taylor paying the debts.

Q. There wasn't any controversy at that time in reference to Mr. Murrish's holdings in the corporation while you were in Denver?

A. Wasn't any controversy?

Q. Was there any controversy at all?

(Testimony of C. W. Poole.)

A. Yes, there was a controversy.

Q. Didn't Mr. Murrish insist at that time that he was entitled to a larger holding than that which had been given to him on the books of the company?

A. No.

Q. He didn't? A. No.

Q. Calling your attention to Exhibit "B," on the back of the first page near the bottom to the following words: "In order to make investment safe only necessary to show at \$8 market 35,000 tons of ore; [439—434] \$10 market, 25,000 tons of ore." Was that discussed at that time?

A. Was it discussed?

Q. Yes. A. Yes, it was discussed.

Q. What day? A. Tuesday.

Q. On Tuesday. Where did Mr. Taylor get the figures of 35,000 tons?

A. I think they are a figment of the imagination. Mr. COOKE.—Think it was what?

A. A figment of the imagination; he was assuming certain things.

Mr. THATCHER.—(Q.) Where did he get the figures 25,000 tons? A. He figures—

Q. (Intg.) I am asking you if you know; what is our best surmise as to that?

A. As to where he got them?

Q. Yes.

A. Mr. Taylor knew approximately what the debts were; he knew approximately the operating costs; he assumed a certain figure for the price of tungsten, and then he worked out the proper num-

(Testimony of C. W. Poole.)

ber of tons which would be necessary at that ten-dollar market in order to make a safe investment as against the debts.

Q. And he arrived at 35,400 tons on an eight-dollar market; is that correct? A. Yes.

Q. And he arrived at 25,500 tons at a ten-dollar market; is that correct?

A. That is what it says there.

Q. I am asking you if you recollect?

A. That is what he had there.

Q. And at that time you had made no representations to him, and you had never discussed with him the tonnage in the mine? A. I certainly had not.

Q. And you saw these figures at that time, did you not? A. Yes.

Q. And read them carefully? A. Yes.

Q. And on what kind of a basis did you say Mr. Taylor was expecting to deal with others? [440—435]

A. He said that if there was that quantity in the mine, the mine would be on a banking basis.

Q. And didn't Mr. Taylor say that he wanted the proposition upon a banking basis?

A. He did not.

Q. Did he say who he was going to interest in this property?

A. He said he hoped to interest some New York Trust Company on a banking basis.

Q. On a banking basis? A. Yes.

Q. And yet never at any time did he discuss with you, nor did you tell him what the tonnage of ore

(Testimony of C. W. Poole.)

or values in that mine were? A. I did not.

Q. Did you testify yesterday as follows: "He said that he contemplated if he got such a deal as is here proposed from us, that he would go East, and try and interest some trust company, and he felt that 35,000 on a ten-dollar basis would put that mine on a banking basis—on an eight-dollar basis; and on a ten-dollar basis he felt that 25,000 tons would put the mine on a banking basis."

A. Yes, I testified that way.

Q. Now you knew that Mr. Taylor under the terms of his contract which had then been agreed upon, was going to endeavor to sell the preferred stock in this corporation for enough to pay the debts, didn't you?

Mr. WHEELER.—Objected to on the ground it assumes that on Tuesday the first day of April, the terms of the contract had been agreed upon, at the time that exhibit "B" was presented, which is not in accordance with the testimony.

(The reporter reads the question.)

WITNESS.—Had it been agreed on then?

Mr. THATCHER.—(Q.) Well, you did know at the time you saw this paper that Mr. Taylor contemplated under the terms of this paper [441—436] itself, selling preferred stock for enough money to pay the debts of the company, didn't you?

A. Yes, I knew that.

Q. And that preferred stock was to be redeemable with seven per cent interest, was it not; you knew that, too, didn't you? A. Yes.

(Testimony of C. W. Poole.)

Q. And you knew that Mr. Taylor contemplated that if the deal was made with you folks that he would go East and endeavor to float this loan; is that correct? A. Yes.

Q. Upon a banking basis?

A. Not to every one that he presented it; he had several clients in mind, and mentioned some of them.

Q. Well, didn't you understand if he closed this deal with you that he was going East to endeavor to float this loan on a banking basis?

A. If he could, yes.

Q. Didn't Mr. Taylor repeat to you at all times that he was going into this thing, and would float it upon a banking basis?

A. He certainly did not.

Q. Did he ever use the words "banking basis" upon any other occasion? A. Yes.

Q. When?

A. In Lovelock, at the time I met him with Mr. Jackson.

Q. At the time you met him with Mr. Jackson?

A. Yes.

Q. And he then used the words banking basis?

A. Yes.

Q. What did he say then?

A. Well, in our conversation there I finally said, "Just what did Mr. Bancroft report, if you know?" and he says, 19,800 tons, and I said "Well, what of it?" I said "The most tonnage I ever heard you mention, Taylor, was 35,000 tons, and that is what

(Testimony of C. W. Poole.)

you considered necessary to go in on this thing on a banking basis.”

Q. Now in your conversation at Lovelock, Mr. Taylor stated to you that Bancroft’s report showed 19,800 tons; is that right? [442—437]

A. Yes.

Q. And on what day did that conversation take place?

A. Well, it was on a Saturday, the last Saturday in May.

Q. The last Saturday in May, and when did you go up to the mine?

A. We went up there at noon.

Q. That same day? A. Yes.

Q. And when you got to the mine and made your examination, the only examination you made was as to the assays in the number 3 north and the shaft, is that correct? A. Yes.

Q. And you made no investigation for the purpose of determining tonnage? A. No.

Q. And you knew at that time the tonnage which Mr. Bancroft had reported to Mr. Taylor?

A. I knew what Mr. Taylor said.

Q. And did he at that time in conversation at Lovelock use the words “banking basis”; you said a minute ago that he did, how did he say it?

A. That is the only time it came up, I said “And what of it? The greatest tonnage I ever heard you mention, Taylor, was 35,000, and that was to go into this thing on a banking basis.”

Q. Oh, you did mention 35,000 tons to him in the

(Testimony of C. W. Poole.)

conversation at Lovelock before you went up to the mine? A. Yes.

Mr. WHEELER.—The witness so testified a few minutes ago.

Mr. THATCHER.—(Q.) You mentioned 35,000 tons at that time? A. Yes.

Q. So that is another conversation in which tonnage is brought into question? A. Yes.

Q. You made no statement, however, that there was 35,000 tons? A. I certainly did not.

Q. But you knew that Mr. Taylor had previously contemplated 35,000 tons in that mine?

A. I recollected this exhibit. [443—438]

Mr. WHEELER.—Exhibit “B” you are talking about? A. Exhibit “B,” yes.

Mr. THATCHER.—(Q.) Then in Denver you knew that Mr. Taylor contemplated that there was in this mine 35,000 tons of ore at the time he prepared Exhibit “B”?

A. I didn’t know that he contemplated any tonnage.

Q. Didn’t you know that? A. No.

Q. When Mr. Taylor presented this, did you tell him there wasn’t 35,000 tons in that mine?

A. I certainly did not.

Q. Did you tell him he was wrong?

A. I think there are 35,000 tons in that mine, I still think so.

Q. Did you at that time tell Mr. Taylor there was or was not 35,000 tons in that mine of 1.75 tungsten?

A. I did not.

(Testimony of C. W. Poole.)

Q. Did you tell him there wasn't 25,000 in the mine? A. I did not.

Q. Did you tell him that was a conservative estimate, 35,000? A. I did not.

Q. Did you tell him 25,000 would be a conservative estimate? A. I did not.

Q. You say you believed at that time there was 35,000 tons of ore? A. Yes.

Q. Of 1.75 tungsten? A. Not 1.75 tungsten.

Q. How much would it run in tungsten?

A. In the mine?

Q. Yes, in the mine at that time.

A. I think there is considerable more than 35,000.

Q. Did you think at that time there was that amount blocked out? A. I did not.

Q. Did you think there was that much in sight?

A. I did not.

Q. Did you think there was that much indicated?

A. I did not.

Q. Did you correct Mr. Taylor, or endeavor to correct him, in his [444—439] use of 35,000 tons, at the time he prepared exhibit "B"?

A. There was nothing to correct him for; he was laboring under no misapprehension.

Q. When he presented these figures to you, did you call his attention to the fact that there was not blocked out in this mine, or indicated in this mine, or developed in this mine, 35,000 tons?

A. I did not.

Q. Did you at that time, or did Mr. Murrish or Mr. Nenzel, call his attention to that fact?

(Testimony of C. W. Poole.)

A. I think they did not.

Q. Did you at that time call his attention to the fact that there was not blocked out, developed, in sight, or indicated in that mine 25,500 tons?

A. I did not.

Mr. COOKE.—What is the occasion for these questions? There is nothing on that exhibit that indicated Mr. Taylor assumed they were in sight; the talk was about a nine-year period of working.

Mr. THATCHER.—(Q.) Did any of the others call his attention to that fact?

A. Not so far as I know.

The COURT.—(Q.) When you say that you don't believe there were 35,000 tons blocked out in the mine, in what sense do you use the words blocked out—exposed on four sides?

A. I call ore blocked out when it is exposed on four sides; but I consider ore that is not blocked on four sides, that is, not exposed on four sides, in the ordinary engineering sense is still blocked ore; for instance, if there is an exposure of a body of ore on two sides, I consider that a certain percentage of ore is in sight by those exposures, as much within the meaning of in sight as another tonnage would be if it were exposed on four sides.

Q. When you said you didn't believe there were 35,000 tons blocked out, you meant there were not 35,000 tons exposed on two sides in the mine at that time?

A. I meant that there was not sufficient development work to expose [445—440] that amount of

(Testimony of C. W. Poole.)

tonnage on three sides, four sides, two sides or one side; the development was not sufficient at that time to indicate that tonnage; there were, however, collateral circumstances, aside from the development, which would lead any engineer to the opinion that there possibly might be a much greater tonnage than 35,000 tons in the mine.

Mr. THATCHER.—(Q.) I call your attention to Plaintiff's Exhibit number 12, and ask if you ever saw that letter before—did you ever see it before? (Hands to witness.)

A. That is the letter you showed me this morning.

Q. Yes. You never saw it before until to-day or yesterday?

A. Not to the best of my recollection.

Q. I call your attention to this paragraph in the letter; "In order to work in with Bancroft's position, I suggest that Poole come to Denver during the first week in April, bringing exact data as to development work, assays, etc., so that he and Bancroft together can work up a definite tonnage statement of present ore developed." Was that ever called to your attention before you went to Denver?

A. No.

Q. Mr. Friedman, the President of the company, to whom this letter is addressed, didn't call your attention to it? A. No, he did not.

Q. You did take maps with you, however?

A. Oh, yes.

Q. Did you take any assays with you?

(Testimony of C. W. Poole.)

A. I took the maps just in the shape they are.

Mr. WHEELER.—The map, Exhibit “Y”?

A. All of them.

Mr. THATCHER.—(Q.) Have you any map here which has an assay plan on it? A. Have I?

Q. Yes. [446—441]

A. No, I never had one.

Q. Did you have one then at that time?

A. I had a copy of plate 5.

Q. Of Bancroft’s report?

A. Yes, Mr. Bancroft had sent that to me; I don’t know whether I had it with me or not, but he had sent it to me at the mine, or at Rochester, and he had sent two to the mine, I had seen that.

Q. Did you have any assays, or were any assay certificates or reports presented to you before you left to go to Denver? A. No.

Q. None at all? A. No.

Mr. WHEELER.—You are speaking now of assays as distinct from pannings?

A. Yes, he said assay certificates, as I understood him.

Mr. THATCHER.—(Q.) You stated a moment ago, or was it Mr. Cooke, that this Exhibit “B” contemplated running the mine over a long period of time, is that right?

A. Yes, it mentions nine years.

Q. Nine years, that was the period for the work? What was the capacity of the mill that you had over on this property?

A. You mean tons of ore per day?

(Testimony of C. W. Poole.)

Q. Yes, sir, tons of ore per day.

A. About one hundred tons per day.

Q. About one hundred tons per day, that would be how much in a year?

A. That would be 36,000 tons, probably more than that—yes, 36,000. It would be 3,000 tons a month, twelve months, it would be 36,000 tons.

Q. Then the 35,000 tons referred to here was just one years ore about, wasn't it?

A. Well, it is 36,000 and 35,000, they are practically the same figure; yes.

Mr. WHEELER.—(Q.) One thing I would like to be clear on; The [447—442] figures on that map refer to a nine-years run, or over 270,000 tons of ore in the mine—I mean the exhibit "B"?

A. Well it does not state tonnage, it states production.

Q. Well, the proposition is this, the plan as outlined there seems to contemplate running for nine years? A. Yes.

Q. At a ton a day, which would give between two and three hundred thousand tons of ore in nine years, wouldn't it?

A. It was a production of one ton of scheelite per day.

Q. One ton of scheelite per day?

A. Yes, that is right.

Q. How many tons of ore make a ton of scheelite, assuming a percentage of 1.75?

A. I can't give you that figure offhand. Let's see, 1.75, that is not net.

(Testimony of C. W. Poole.)

Q. At any rate, are you sufficiently familiar with the subject in your mind to say that a nine-year run, producing one ton of scheelite per day on ore that went 1.4 or 1.75 would call for between two and three hundred thousand tons of ore?

A. Yes, it would.

Mr. THATCHER.—(Q.) Is there anything in exhibit “B” which would indicate or show you, outside of the nine-years run, that 250,000 tons of ore was contemplated? A. Is there?

Q. Yes, sir. Take the first page of figures; I call your attention on the first page to “Ten-dollar basis, gross profit, \$1,401,000.” On a ten-dollar basis, what tonnage would it take for that?

A. It would take 157,000 tons, wouldn’t it—I don’t know, I can’t calculate that in my head.

Q. You can’t calculate it in your head. Now when you got to San Francisco, was there any discussion between yourself and Mr. Jackson, or any one else, with reference to tonnage? [448—443]

A. Was there?

Q. Yes. A. Not that I recall.

Q. You don’t recall any discussions of tonnage?

A. No, I don’t.

Q. When did you first see Mr. Bancroft’s report, Mr. Poole? A. When did I first see it?

Q. Yes.

A. I saw the report Sunday, in Denver, the latter part of March—March the 30th.

Q. Who gave it to you? A. Mr. Taylor.

Q. What did you do with it, take it with you?

(Testimony of C. W. Poole.)

A. Took it to the hotel, Brown Palace Hotel, that evening.

Q. Did you read it over? A. Yes.

Q. Did you examine it with some care?

A. Not with great care, I read it through.

Q. Read it through? A. Yes.

Q. Was there anything in that report that would show you how Mr. Bancroft figured the tonnages in a mine, or indicated ore?

A. Was there anything in it?

Q. Yes.

A. Well, there was nothing that fixed itself on my mind; I don't think there is anything in it.

Q. There is nothing in the report that would show you that, according to your best recollection?

A. Not according to my best recollection.

Q. You stated Mr. Taylor had a letter, telegram or memoranda, or something of that kind, which showed Mr. Bancroft's method.

A. Yes, he had something there.

Q. Did you see it?

A. I didn't examine it; he had it alongside of him, using it.

Q. Did you read it? A. No, I did not.

Q. Did you discuss it with him at all, with Mr. Taylor? A. Did I discuss it? [449—444]

Q. Yes, Bancroft's method?

A. I asked him certain questions.

Q. What did you ask him?

A. Well, I remember asking him how many cubic feet of ore in place Bancroft considered a ton.

(Testimony of C. W. Poole.)

Q. And how much did he say?

A. My best recollection is he said fourteen; he may have said thirteen or fifteen.

Q. And was fourteen used in the calculations of tonnage made at that time?

A. The figure Mr. Bancroft gave was used; I didn't make the calculations and I am not certain.

Q. You don't recall whether fourteen or fifteen, or what figure for the number of cubic feet per ton was used at that time?

A. I don't recall the exact figure; I know it was 13 or 14 or 15, 13 or 14 is my best recollection.

Q. Your best recollection is it was 14?

A. That is my best recollection, it was 14, yes.

Q. Will you at the noon recess compute the tonnage in blocks "M" and "N," using the data which you have on your mine map, assuming it to be the average width throughout the block, and using 14 cubic feet as a ton?

Mr. WHEELER.—I think the witness has shown himself quite capable of making these calculations, but I don't think such a burden should be put upon him.

Mr. THATCHER.—There is a conflict of testimony on that, if the Court please; Mr. Taylor testified that he did not make those calculations.

Mr. WHEELER.—He has shown himself quite capable of making those calculations; if you want those figures we are not prepared to give them to you as a mere accommodation; the witness should

(Testimony of C. W. Poole.)

have his lunch. It is not cross-examination, and we object.

The COURT.—I think I will sustain the objection to that as not being cross-examination. [450—445]

Mr. THATCHER.—(Q.) Well, will you voluntarily agree to do that?

A. Will I agree to do it?

Q. Yes.

A. Yes, I will agree to do it; I will gladly do it if you want it done.

Q. I should like to have it.

A. I would like to say this, though, may I say one thing more?

The COURT.—Certainly.

WITNESS.—You realize, Mr. Thatcher, on this Exhibit “Y” are averages of widths there, 5 to 15 feet, and in this calculation of tonnage which Mr. Taylor made in my presence, the discussion came up as to what was the proper width to use with reference to those places where the width is not accurate, and I recommend to Mr. Taylor, I thought a conservative thing would be to be guided by Mr. Bancroft’s report, and I remember we looked in Mr. Bancroft’s report, and the widths set down there as four and a half feet to five feet—I don’t recollect whether four and a half or five feet was the width used in these calculations or not, and I would like to have you tell me whether you wish me to use four and a half or five feet, or ten feet.

(Testimony of C. W. Poole.)

Q. Use as near as you can the figures that are on that map.

Mr. WHEELER.—The witness says that he does not know, that he suggested this to Mr. Taylor, and does not know what Mr. Taylor used.

WITNESS.—I would be glad to make these calculations for you if you would tell me definitely what calculations it is you want made.

Mr. THATCHER.—(Q.) When you made these calculations at that time you had two maps in front of you, did you? A. Yes.

Q. And what were those maps?

A. One was the mine map, Exhibit “Y,” and the other was a photostat, an extra copy of the photostat in Exhibit 15. [451—446]

Mr. WHEELER.—Plate 5? A. Plate 5, yes.

Mr. THATCHER.—(Q.) What other instruments did you use in working out the calculations?

A. What other instruments?

Q. Yes; used a ruler, did you?

A. Used a couple of them.

Q. I understand you searched through Mr. Bancroft’s office and drafting table, and were unable to find any drafting rulers, or engineer’s rulers?

A. Yes.

Q. And then you used an ordinary ruler?

A. Yes.

Q. One with advertising on it? A. Yes.

Q. Was Mr. Bancroft’s office locked at that time?

A. Was it locked?

Q. Yes. A. There were two offices.

(Testimony of C. W. Poole.)

Q. Yes.

A. As I recall it; the first office in which Mr. Bancroft had his library, and in which most of our conferences took place, was an office which Mr. Taylor was occupying himself; Mr. Taylor explained that he had been away to war and given up his offices, and that he was temporarily using Mr. Bancroft's office. Then there was another room there in which there was a drafting table, and as I recall it, there was a drawer under the drafting table with some drafting instruments in it, and he searched both of those offices.

Q. Were you with him at that time when he was looking for them? A. Was I with him?

Q. Yes, when he was looking for the drafting instruments, or ruler?

A. I remember being with him when he pulled the drawer out in the room where the drafting table was; whether it was a drawer in that drafting table or a cabinet alongside, I don't recollect.

Q. You don't recollect, didn't pay much attention to it A. No. [452—447]

Q. You didn't find any scale or ruler at that time? A. No, we didn't find any scale.

Q. Did you testify yesterday, Mr. Poole, that you didn't give Mr. Taylor any percentages at all until the conference or meeting on the morning of Wednesday? A. Did I testify that way?

Q. Yes. A. I think not.

Q. Did you testify as follows yesterday; "Did you on that occasion or on any occasion prior to

(Testimony of C. W. Poole.)

entering into the contract Exhibit "C," state or represent to him that there were in that mine either blocked out or in sight or developed any quantity of ore whatever? A. I did not." Did you so testify? A. I did.

Q. "Q. Were the figures as to values, or any of them appearing on plate 5, other than those which appeared upon the original photostat, placed either by you or by Mr. Taylor upon the photostat which you say was used on the 2d day of April in the conversation that you had with Mr. Taylor?

A. I don't think the percentages were placed on that photostat, though I could not be certain of that." Did you so testify yesterday?

A. Yes, certainly I did.

Q. Did you testify as follows: "I had cautioned Mr. Taylor against the unreliability of those estimates on the map, and I scarcely think that I would have put them down myself on that photostat; he may have put them down and I not known it, as he had our maps most of the time while we were in Denver." A. Yes.

Q. "But I don't recall having put those percentages down myself, and I scarcely think I would have done it." Did you so testify yesterday?

A. Yes.

Q. Did you testify as follows: "Q. By that photostat what photostat [453—448] do you mean? A. I mean the photostat I have just described as prepared by Mr. Taylor and myself. Q. On the 2d day of April? A. Yes. Q. When

(Testimony of C. W. Poole.)

you speak of those figures you cautioned him against, what figures do you refer to? A. I refer to the figures in this exhibit of our map, whatever you call that, the one you just put in evidence. Mr. Thatcher.—The mine map, Exhibit “Y.”

A. Yes. Mr. Wheeler.—(Q.) By that you mean the figures— A. (Intg.) The figures showing

certain percentages, shown on the map in several places. Q. The figures showing the percentages, not the figures showing the tonnage? A. No,

just the figures showing percentages. Q. What

did you say to him on that subject? You say you

cautioned him? A. I told him those figures were

merely estimates which had been placed on that

map by John Huntington, who was the mining

engineer who had brought this map up to date,

and that Mr. Huntington had gotten that informa-

tion from Mr. Morrin, who was the superintendent,

and Mr. Morrin had arrived at those values by

panning in the mine; and he knew, as well as I

did, that panning was a very unreliable way of

arriving at the value of ore. Q. This you say was

what you said to him? A. Yes.” Did you so tes-

tify? A. Yes.

Q. Now when Mr. Taylor was at the mine in the middle of April, you took him through, did you, through the mine? A. Yes.

Q. You came there in response to a telegram from the mine, did you, from Tonopah?

A. I came from Tonopah, and my best recollec-

(Testimony of C. W. Poole.)

tion is that either Mr. Friedman or Mr. Nenzel wired me that I had to come.

Q. That Mr. Taylor was coming? A. Yes.

Q. And at that time you went through the mine?

A. Yes.

Q. Did you at that time check up the distances with Mr. Taylor on new work? A. Yes.

Q. Were many pannings taken?

A. Yes, quite a few. [454—449]

Q. How many were taken, if you recollect?

A. Oh, twenty-five or thirty, maybe more, I can't say.

Q. Did Mr. Taylor do any panning?

A. He took a few.

Q. And you testified that he was not a very skillful panner, I understand? A. Yes.

Q. He didn't know anything about panning, did he?

A. Well, he knew the method, but he was clumsy.

Q. He was clumsy, and he wasn't a good panner?

A. No.

Q. At that time you panned about twenty-five or thirty pannings?

A. The superintendent did most of the panning.

Q. You and the superintendent? A. Yes.

Q. How many did you and the superintendent pan altogether? A. Twenty-five or thirty.

Q. Didn't you testify yesterday that you panned a hundred?

A. I may have; we may have panned a hundred.

Q. Didn't you so testify yesterday?

(Testimony of C. W. Poole.)

A. If I did, I certainly did.

Q. Were they taken from all parts of the mine, these pannings that you took on that occasion?

A. Not from all parts, no.

Q. What workings did you visit?

A. Visited all the workings.

Q. How many feet of workings are there in the mine?

A. I can't say; possibly three or four thousand feet, maybe more.

Q. How long were you down in the mine?

A. I think we were down all forenoon.

Q. Two or three hours or four hours?

Mr. WHEELER.—He said all the forenoon.

A. Possibly four hours.

The COURT.—(Q.) Did I understand you to say you did any measuring at that time?

A. Yes, I had been very cautious in Denver as to the representations [455—450] I made to Mr. Taylor, and one of the things I had vouched for was that the development work as shown on that map, had been done; I said, "Mr. Taylor, I am positive of that" and I wanted to keep Mr. Taylor's confidence, because I expected to be superintendent of that property if Mr. Taylor went through with this thing, and I knew Mr. Taylor was very suspicious at all times.

Mr. THATCHER.—I move to strike it out as not responsive.

The COURT.—The suspicions?

Mr. THATCHER.—Yes.

(Testimony of C. W. Poole.)

The COURT.—Well, that may go out.

WITNESS.—(Contg.) And I wanted to assure Mr. Taylor all representations that I had vouched for in Denver were correct. I took a tape down in the mine underground, and took the map down with me, and checked up those distances right before him, so that he could see that work actually had been done.

Mr. THATCHER.—(Q.) Mr. Taylor stated to you at the time you were in Denver that he relied on you, and expected to have you as superintendent of that mine, did he not? A. He certainly did.

Q. Did you take a map down in the mine in April?

A. Did we take a map?

Q. Yes, when you went down with Mr. Taylor?

A. Yes, we took the mine map.

Q. Which is the mine map that you took down?

Mr. WHEELER.—Exhibit “Y”?

A. Exhibit “Y.”

Mr. THATCHER.—Is that Exhibit “Y”?

A. Yes.

Q. Are these the mine maps you took to Denver with you on that occasion?

A. Yes, every map there was in Denver.

Q. Every map that is here was in Denver?

A. Yes.

Mr. COOKE.—You mean the maps you have in your hand, that were handed to you by us this morning? [456—451]

Mr. THATCHER.—Yes, a bunch of them. We would like to examine these at recess.

(Testimony of C. W. Poole.)

Mr. WHEELER.—Take them, Mr. Thatcher, and examine them, certainly.

At 12 o'clock a recess is taken until 1:30 P. M.

AFTER RECESS—1:30 P. M.

Cross-examination of Mr. C. W. POOLE, Resumed.

Mr. THATCHER.—(Q.) Mr. Poole, my recollection is you stated you had never seen the letter to Mr. Friedman of March 25th, in which Mr. Taylor requested that you come to Denver, and bring the maps showing exact data as to development, etc., Exhibit Number 12, I refer to; that is the letter I showed you this morning? A. Yes.

Q. Did you ever see any other letter or telegram, either to Mr. Nenzel or to the mine, or to Mr. Friedman, or to any of the other defendants, which requested that exact information or data with reference to the development work and assays be furnished Mr. Taylor?

A. I don't recall any such letter.

Q. Did you ever receive any such letter?

A. No, I didn't receive any such letter.

Q. You don't know whether Mr. Taylor ever wrote you such a letter asking you to furnish assays, maps or developments of the mine?

A. I don't know?

Q. Yes, do you?

A. I don't think he did; I have no recollection of any such letter.

Mr. COOKE.—(Q.) That is, you mean that you didn't receive it? A. I didn't receive it, no.

(Testimony of C. W. Poole.)

Mr. THATCHER.—(Q.) I call your attention to what purports to be a copy of a letter, and ask you if you ever saw the original of that? (Hands to witness.) [457—452]

A. Yes, I think I saw the original of that letter, Mr. Thatcher.

Q. Did you receive it in the mail?

A. I think I did, yes.

Q. Have you the original now?

A. I haven't it in my pocket; it may be here; I turned over all my correspondence to the attorneys; if I had it, they have it.

Mr. COOKE.—We have no objection to your using a copy.

Mr. THATCHER.—We offer it in evidence, if the Court please. It has been identified as a copy of a letter received by Mr. Poole from Mr. Taylor.

The COURT.—Any objection?

Mr. COOKE.—We object to it as incompetent, irrelevant and immaterial, and especially assign that it does not tend to prove any issue in this case. It is not a request upon this witness for data as to anything except data by which the workings shown upon Mr. Taylor's maps in Denver may be kept up with the workings made on the ground.

The COURT.—It may go in.

Mr. THATCHER.—(Q.) You testified yesterday, Mr. Poole, that you saw either Mr. Bancroft's telegram to Mr. Thane, or Mr. Taylor's telegram to Mr. Thane with reference to ore tonnage; is that correct? A. I saw a copy of it.

(Testimony of C. W. Poole.)

Q. A copy of it? A. Yes.

Q. Didn't you see the original? A. No.

Q. Didn't you see the one that Mr. Thane received? A. No.

Q. Didn't you have that in your possession, and send it back to Mr. Thane?

Mr. DAVIS.—One moment. I think you will find the record is this letter you last introduced in evidence, is already in evidence as Plaintiff's Exhibit 5.

Mr. COOKE.—Yes, that is correct. [458—453]

Mr. THATCHER.—Then we withdraw that, the last one, and let Exhibit Number 5 stand.

Q. Didn't you see the original telegram which was received by Mr. Thane; didn't you have it in your possession, and mail it back to Mr. Thane?

A. I did not.

Mr. COOKE.—What particular telegram are you talking about?

Mr. THATCHER.—The one in which he stated yesterday in his direct examination that he was familiar with the telegrams that referred to tonnages in the mine, sent by Mr. Taylor to Mr. Thane, and which he referred to at the time in which he says he stated that Mr. Taylor was lying to him, not telling the truth.

Q. I call your attention to a letter and a telegram, and ask you if you ever saw those before? (Hands to witness.)

A. Yes, I have seen these before.

(Testimony of C. W. Poole.)

Q. Is that the telegram you referred to yesterday in your testimony?

A. I believe that that telegram was left in my box at the New Willard Hotel, and I examined it and attached that note and left it in Mr. Thane's box.

Q. Is that the telegram you referred to in your testimony yesterday?

A. The thing that I referred to was a copy of that telegram; that was all I recollected; Mr. Thane had made a copy of that, and he gave me the copy on a sheet of paper, a blank sheet of paper, as I recall; I had forgotten this incident.

Mr. DAVIS.—A copy of that telegram is already in evidence marked Defendant's Exhibit "D."

Mr. THATCHER.—Well, I want the letter and telegram identified, and have them in as they stand.

Q. What was done with it?

A. The best of my recollection is that it was not mailed; the whole thing occurred at the new Willard Hotel; he left it in my box and I looked at it, and wrote that note and left it in his box at the New Willard Hotel in Washington; that is my recollection of it.

Mr. COOKE.—No objection as far as we are concerned. It is already in evidence.

(Telegram dated May 25, 1919, from David Taylor to B. L. Thane, and letter dated May 26, 1919, from C. W. Poole to B. L. Thane, marked Plaintiff's Exhibit No. 49.)

(Testimony of Rudolph Nenzel.)

Mr. THATCHER.—That is all.

Mr. WHEELER.—That is all, Mr. Poole. [459—454]

Testimony of Rudolph Nenzel, for Defendants.

Mr. RUDOLPH NENZEL, one of the defendants, called as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct Examination by Mr. WHEELER.

Q. Mr. Nenzel, you are one of the defendants in this action? A. Yes, sir.

Q. Were you in Denver, Colorado, on the 30th day of March, 1919? A. I was.

Q. Were you also there on the 31st day of March, and the first and second days of April?

A. Yes, sir.

Q. Were you in the office of David Taylor, the plaintiff in this action, on each of those days?

A. I was.

Q. Was there on any or either of those days, or at any time or place on the occasion of your visit to Denver at the times just testified to by you, any statement made by you that there was at that time blocked out, in sight and ready for mining and reduction of the concentrates, over 60,000 tons of scheelite ore, which would carry an average of 1.75 per cent tungstic acid? A. No, sir.

Q. Was there on any of those occasions, or at any time while you were in Denver on those dates, any statement made by you to the plaintiff David Taylor that there was over 60,000 tons of scheelite

(Testimony of Rudolph Nenzel.)

ore in the mine or mining property of the defendant, Nevada Humboldt Tungsten Mines Company?

A. No, sir.

Q. Was there on any or either of those days or dates, or on the occasion of your said visit to Denver, any statement made by you to David Taylor, that the ore, or any quantity thereof, in the Nevada Humboldt Mines Company's property would carry an average of 1.75 per cent tungstic acid?

A. No, sir.

Q. Was there on any or either of those occasions any statement of [460—455] the kind or character, or in substance or in form, indicated in my previous questions, made to Mr. Taylor in your presence, by the defendant Murrish? A. No, sir.

Q. Was there on any or either of those occasions at any time during your said visit to Denver, any statement of a similar kind or character to this indicated in my previous questions, made in your presence by the defendant Poole?

A. There was not.

Q. Did Mr. Poole on Monday, the 30th or 31st day of March, 1919, state in your presence to the plaintiff Taylor that there was over 60,000 tons of ore developed within blocks indicated by the lines upon the map plate 5, annexed to Plaintiff's Exhibit 15? A. No.

Q. You are familiar with that plate, are you, and that exhibit? A. I am.

Q. Was there on that occasion any statement made in your presence by the defendant Poole to

(Testimony of Rudolph Nenzel.)

the plaintiff Taylor, that there was any tonnage of ore in that mine which would average over 1.75 per cent tungstic acid? A. No.

Q. Was any statement in substance or to the effect just indicated in my last questions to you made in your presence by Mr. Poole to the plaintiff David Taylor. A. No.

Q. Did the defendant Poole in your presence in talking to David Taylor on the occasion of your visit to Denver in 1919, in the months of March and April, say, in substance or effect, "There are 60,000 tons of ore" referring to the mine or mines of the defendant, Nevada Humboldt Tungsten Mines Company, "60,000 tons of ore that will average over 1.75 per cent, developed in the mine"?

A. No.

Q. Did he say that there were more than 60,000 tons blocked out, developed and in sight, or blocked out, or developed, or in sight in the said mines?

A. He did not. [461—456]

Q. Did Mr. Poole on any day on the occasion of that visit to Denver in your presence state to the plaintiff David Taylor, that there was any tonnage of ore blocked out in the mine or mines of the defendant Nevada Humboldt Tungsten Mines Company? A. No, sir.

Q. Did he say that in substance or effect? Did he say in substance or effect that there was any tonnage of ore blocked out in the mine?

A. He did not.

(Testimony of Rudolph Nenzel.)

Q. Did he say that it was in sight or developed in the mine? A. No, sir.

Q. Any tonnage. A. No, sir.

Q. When did you first see plate 5 annexed to plaintiff's exhibit 15, in its present condition? (Hands to witness.)

A. Here in the court room.

Q. Had you prior to that time seen what you can identify or recall as a photostat to any part or portion of plate 5? A. Yes, sir.

Q. Where had you seen such a photostat?

A. We had one in Lovelock in the office.

Q. Had you seen any other at any other time or place?

A. In the office of David Taylor, Denver.

Q. When?

A. On Sunday afternoon, March 30, 1919.

Q. Was that identical with plate 5, or was it the photostat referred to by you a moment ago, or a duplicate of it? A. A photostat.

Q. Where was it when you saw it; in what condition, in what place?

A. It was attached to the report of Mr. Howland Bancroft.

Q. Was the report on that day presented to either you or Mr. Poole by Mr. Taylor?

A. Yes, sir, it was given to Mr. Poole and I read it.

Q. And you read it? A. Yes. [462—457]

Q. Where did you read it, at the office of David Taylor, or at the hotel that night?

(Testimony of Rudolph Nenzel.)

A. I think I read it at the hotel.

Q. You saw the photostat at that time?

A. Yes, sir.

Q. And you know that it did not contain the marks, all the marks, that now appear thereon?

A. Yes, sir.

Q. Can you say that the document in your hand, Exhibit 15, is the identical document that on that occasion was given into the hands of Mr. Poole in your presence by Mr. Taylor?

A. No, it may be a copy of it.

Q. It may be a copy of it. If it is a copy what would be your best impression, is it a duplicate or—

Mr. THATCHER.—I object.

Mr. WHEELER.—(Q.) In other words, you can't definitely identify this as the precise document? A. I cannot.

Q. Was the plate, Exhibit 5, annexed to Exhibit 15, in its present condition ever at any time in your presence, or by you inspected or seen by you in Denver in the year 1919? A. It was not.

Q. You mention having seen a photostat in the office of David Taylor; in what condition was that photostat?

A. He had two copies, as I remember, he got out of the drawer of a filing cabinet of some kind.

Q. On what day did you see the photostat or photostats of which he had two copies that he got out of a drawer? A. That was on Wednesday.

(Testimony of Rudolph Nenzel.)

Q. Who was present at the time that the photostat referred to by you, or photostats, were produced by Mr. Taylor?

A. Mr. Poole and Mr. Taylor and myself.

Q. You, Mr. Poole and Mr. Taylor were together? A. Yes.

Q. Had Mr. Murrish been there on that day at any time that you saw these photostats? [463—458]

A. I do not believe that Mr. Murrish was there.

Q. You say he was not there; I asked if he had been there? A. Yes, he had been there.

Q. What had taken place during the visit or the presence of Mr. Murrish on that day?

A. Well, we went over a contract which we eventually signed.

Q. What, if anything, did Mr. Murrish do or did Mr. Taylor do with Mr. Murrish?

A. Well, Mr. Taylor had prepared an agreement to be signed by us, which was later on changed or modified; there was some error in its construction as it was drawn up; and I believe that after a little discussion Mr. Taylor asked Mr. Murrish to dictate the contract to the stenographer in his form, as he wants it drawn up.

Q. What did Mr. Murrish do?

A. As I remember, he and Mr. Taylor left the room and went into an adjoining room to dictate this contract to a stenographer.

Q. When next did you see Mr. Murrish?

A. Well, I should say between one-thirty and two o'clock that afternoon.

(Testimony of Rudolph Nenzel.)

Q. When next did you see Mr. Taylor after he left the room with Mr. Murrish?

A. A few minutes afterward.

Q. Where?

A. As I remember, we went into the drafting room at least there was a drafting table in that room, with Mr.—

Q. (Intg.) On what date was this?

A. This was on Wednesday.

Q. April— A. Second.

Q. 1919? A. Yes, sir.

Q. Proceed, please, what took place in the room after Mr. Taylor came in?

A. Mr. Taylor asked Mr. Poole regarding some figures, and Mr. Poole had his mine map, which has been introduced here as Exhibit “Y,” I believe, and Mr. Taylor produced a photostat, which he got out of one of the drawers or filing cabinets, and the first [464—459] thing they done was to transfer the extensions which were on the map to the photostat.

Q. How was it done, what was the process of transferring, describe it fully?

A. They spent a little time looking around for an engineer’s ruler, they couldn’t find any, and just used an ordinary rule, a foot rule or ten-inch rule.

Q. Where were the gentlemen with reference to this drawing table?

A. Mr. Poole was in front of the drawing table, and Mr. Taylor was to his right.

Q. Where were you?

A. I was to the left at the end of the table.

(Testimony of Rudolph Nenzel.)

Q. Were any of you sitting, or were you all standing?

A. We were all standing, as I remember.

Q. Did you look and see what was being done?

A. Well, yes.

Q. Did you hear what was being said?

A. I could not recall what was said any more than that the extensions were transferred from Mr. Poole's map to the photostat.

Mr. THATCHER.—I move to strike out the answer as not responsive; the question was, what was said.

The COURT.—It may go out.

A. Yes, I could have heard them, sure.

Mr. WHEELER.—(Q.) What was Mr. Poole doing in this process of transferring, and what was Mr. Taylor doing?

A. Mr. Poole was measuring off the distances on his map, and Mr. Taylor was placing the extensions on the photostat which he had before him.

Q. Were any computations made by either of these gentlemen in your presence on that day?

A. Yes; Mr. Taylor done some figuring which Mr. Poole placed on his photostat map.

Q. On that occasion was anything said by Mr. Poole to Mr. Taylor [465—460] with reference to there being 60,000 tons of ore in the mine, or indicated by the figures, or otherwise?

A. No, sir.

Q. Was anything said on that occasion, in substance or to the effect that there were 60,000 tons of

(Testimony of Rudolph Nenzel.)

commercial ore in the mines represented on the map—mine or mines represented on the map?

A. No, sir.

Q. Was there anything on that occasion said as to the ore in the mines, mine or mines represented on the map, averaging 1.75 per cent tungstic acid?

A. No, sir.

Q. At what time in the afternoon was the contract Exhibit "C" here offered in evidence annexed by copy to plaintiff's complaint, executed?

A. About 2 o'clock in the afternoon, possibly a little later.

Q. Who was the first party to sign that contract.

A. Mr. Murrish.

Q. What did Mr. Murrish do, if anything, after he affixed his signature to the contract?

A. Left the office.

Q. Did he take any copy of the contract away with him? A. No, sir.

Q. Was the contract executed by either of the other parties thereto prior to the time that Mr. Murrish left the office? A. It was not.

Q. How soon after Mr. Murrish left were the signatures of Mr. Taylor and yourself and Mr. Poole affixed?

A. Immediately after Mr. Murrish left.

Q. When did you leave Denver?

A. I believe we left Denver about 6 o'clock, 5:30 or 6 o'clock.

Q. Did you come directly to Nevada?

A. No, we stopped in Salt Lake.

(Testimony of Rudolph Nenzel.)

Q. Do you recall a trip to San Francisco in the latter part of May or the first part of June, 1919, in which you met Mr. Jackson, [466—461] one of counsel for the plaintiff? A. Yes, sir.

Q. Do you recall that? A. Yes, sir, I do.

Q. How soon after reaching San Francisco, and on what day and date did you first see Mr. Jackson and Mr. Taylor in San Francisco?

A. On Monday up in Mr. Bayless' office.

Q. Monday, what date, do you now recall; I would like to have that date, I suppose there is no question about it? A. June 2d, 1919.

Q. On that occasion do you recall any statement or statements made by Mr. Jackson?

A. Yes, sir.

Q. State what in substance and effect Mr. Jackson said in your presence on that day?

A. Well, he said that we had represented there were 60,000 tons of ore in the mine while we were at Denver, and that Mr. Bancroft's report only shows 19,000, and that therefore they wanted to make a modified agreement with us.

Q. When he made that statement that you gentlemen had represented to Mr. Taylor that there were 60,000 tons of ore in the mine, did you nod your assent thereto? A. I did not?

Q. Did you orally express assent thereto?

A. I did not.

Q. Did you do anything whatsoever to indicate your assent thereto. A. No, sir.

Q. Did you assent to that statement?

(Testimony of Rudolph Nenzel.)

A. I did not.

Mr. THATCHER.—Object to it as calling for the conclusion; he may tell what he did. I move to strike out the answer of the witness; I didn't have a chance to object before the question was answered.

Mr. WHEELER.—I think it may go out, your Honor.

The COURT.—Very well.

Mr. WHEELER.—(Q.) Did you remain silent on the occasion when [467—462] he made that statement? A. I did.

Q. Why.

Mr. THATCHER.—Object as calling for the conclusion of the witness, and immaterial.

Mr. WHEELER.—I submit, your Honor, where it is attempted to show acquiescence by silence, if there was any occasion for the silence the witness has a right to state.

The COURT.—I will let him state it.

WITNESS.—That morning before we went to the office Mr. Poole, Mr. Murrish, Mr. Jones and myself agreed amongst the—

Mr. THATCHER.—(Intg.) Object on the ground this is a conversation and agreement which took place outside of the presence of the plaintiff, and not binding upon him.

Mr. WHEELER.—I submit that where the question of one's acquiescence in a statement is to be inferred from his silence, that if there was an

(Testimony of Rudolph Nenzel.)

occasion for the silence he can state what it was, the state of his mind.

The COURT.—He is now attempting to relate a conversation that he had with his associates. I will let him say that they agreed not to do it, if that is all there is to it?

Mr. WHEELER.—That is all I care about.

WITNESS.—We agreed not to say a word, but to hear Mr. Taylor's proposition.

Mr. WHEELER.—(Q.) On any occasion after this statement had been made by Mr. Jackson, did Mr. Jackson again refer to the same matter?

A. He did.

Q. When? A. That afternoon.

Q. What did Mr. Jackson say on that occasion?

A. He said that we consented through silence, and some Latin word, I don't know.

Q. Who was present when he said that? [468—463]

A. Mr. Jones, Mr. Poole, Mr. Murrish, myself, Mr. Taylor and Mr. Bayless.

Q. What did you say when he said that?

A. I told him that I did not consent by silence, and told him that I did not understand his words when he used that foreign language which he used.

Q. What language did he use, do you know; how did he put it, do you know now what the words were that he used?

A. Acquiescence, or something like that?

Q. You said that to him, that you didn't understand the language that he had used, and you refer

(Testimony of Rudolph Nenzel.)

to his words acquiescence by silence? A. Yes.

Q. Were these other gentlemen present, and did they hear you say that? A. Yes, sir.

Q. What did Mr. Murrish say?

A. He said that he did not consent by being silent.

Q. What did Mr. Jones say?

A. Mr. Jones I don't believe said anything.

Q. What did Mr. Poole say?

A. He said that he did not make such a representation.

Q. Was Mr. Jones at Denver on the occasion of your visit there with Mr. Poole and Mr. Murrish?

A. He was not.

Mr. WHEELER.—You may cross-examine.

Cross-examination.

Mr. THATCHER.—(Q.) Mr. Nenzel, you went to Denver after some correspondence with Mr. Taylor, did you? A. Yes, sir.

Q. I call your attention to that letter, Plaintiff's Exhibit 12, and ask you if you ever saw that before? A. Yes, sir, I have.

Q. Did you read that letter? A. Yes, sir.

Q. About the time it was received in Lovelock? [469—464] A. Yes, sir.

Q. Called it to Mr. Friedman's attention, did you? A. Yes, sir.

Q. Call it to any of the other defendants' attention?

Mr. WHEELER.—Object to it as not cross-examination.

(Testimony of Rudolph Nenzel.)

The COURT.—It don't seem to me that this is cross-examination, is it, Mr. Thatcher?

Mr. THATCHER.—I am rather doubtful of it myself, if the Court please; the direct examination was so limited that I was not sure about that question. (Q.) Well, you went on to Denver anyway, did you, Mr. Nenzel? A. Yes, sir.

Q. And arrived there on Sunday, the 30th?

A. Yes, Sunday, May 30th.

Q. And on Sunday, May 30th, you were in conference with Mr. Taylor, yourself, Mr. Poole and Mr. Murrish were in conference with him?

A. Yes, sir.

Q. At that time was anything said by any of you as to the tonnage in the mine, or amount of ore in it? A. No, sir.

Q. And was anything said as to what the ore would run? A. There was not.

Q. Nothing said. Was anything said as to the amount of development that had been carried on in the mine—on Sunday I am talking about?

A. Yes, Mr. Poole showed Mr. Taylor his mine map on that day—Exhibit “Y.”

Q. And did he show him how much work had been done since the Bancroft report?

A. Yes, that was noted on the map.

Q. That was noted on the map at that time?

A. Yes, sir.

Q. That was since the first Bancroft report?

A. Yes, sir.

Q. And no statement was made at that time by

(Testimony of Rudolph Nenzel.)

anybody, especially by yourself, Mr. Murrish, or Mr. Poole, as to whether the mine ran high or low, one per cent, another per cent, or anything of that kind? A. No, sir. [470—465]

Q. And nothing was said as to whether or not there was any tonnage, whether there was ten tons or 60,000 tons in the mine?

A. No, sir, there was not.

Q. Now on Tuesday was anything said by yourself, or Mr. Poole or Mr. Murrish as to what the mine assayed at any point at all?

A. There was not.

Q. Or was anything said at that time as to whether it contained any tonnage at all, whether there was any ore in sight? A. No, sir.

Q. Was anything said on Monday or Tuesday by either of you three to Mr. Taylor to the effect that any ore, commercial ore, was blocked out or in sight or developed, or even indicated in the mine?

A. No, sir.

Q. As a matter of fact, on Monday and Tuesday you never discussed the question of whether the mine had one ton or 60,000 tons, is that correct?

A. Yes, sir.

Q. Or whether it ran no per cent or ten per cent in tungsten? A. That wasn't discussed.

Q. Never discussed it. On Tuesday now, what happened; was there any discussion then as to the mine values? A. No, sir.

Q. None at all. Was there anything said at that

(Testimony of Rudolph Nenzel.)

time as to whether or not there was one ton or ten ton or 60,000 tons in the mine, on Tuesday?

A. There was a discussion there with reference to making a deal.

Q. Well, I mean was there any statement made by yourself or Mr. Poole or Mr. Murrish at that time as to whether this mine contained one ton or 60,000 tons of ore? A. No, sir.

Q. Tonnage was never mentioned at that time as to what the mine contained, as far as you folks were concerned? A. No.

Q. Did either one of you at any time that you were there state to [471—466] Mr. Taylor that the mine would run 1.75 per cent tungsten?

A. No, sir.

Q. Did you give him any figure at all at that time as to what it would run, the ore in the mine?

A. No, sir.

Q. Then my understanding of your testimony is that on these three days, Monday, Tuesday and Wednesday, the 30th, 31st and 1st, that neither one of you, that is, to your knowledge, ever told Mr. Taylor that this mine contained any number of tons, or any percentage of tungsten; that it was not mentioned at all as far as you folks were concerned? A. It was not.

Q. Never mentioned. And then on Wednesday it was not mentioned until after Mr. Murrish and Mr. Taylor had started to drafting the contract?

A. Yes, sir.

Q. And then after you had agreed on the deal,

(Testimony of Rudolph Nenzel.)

and Mr. Murrish was drawing the papers, then there was some general discussion with reference to tonnages and percentages?

A. Between Mr. Poole and Mr. Taylor, yes, sir.

Q. Between Mr. Poole and Mr. Taylor?

A. Yes, sir.

Q. And that resulted in the map or photostat map, and the other which you have here testified?

A. Yes, sir.

Q. But all of that took place after you had agreed on the deal and Mr. Murrish was drawing the contract?

A. Yes, sir.

Q. What time did you get there on Wednesday morning?

A. As well as I remember, it was around nine-thirty or ten o'clock.

Q. Might it not have been ten-thirty?

A. No, it wasn't that late.

Q. If Mr. Poole said it was ten to ten-thirty he might have been mistaken?

A. He might have been.

Mr. COOKE.—I object to this witness passing on somebody else's testimony. [472—467]

The COURT.—The objection is good.

Mr. THATCHER.—(Q.) How long did you stay?

A. We stayed till lunch time.

Q. Went out to lunch? A. Yes.

Q. Did Mr. Taylor go with you? A. No, sir.

Q. What time did you come back?

A. Well, I think it was between one-thirty and two o'clock.

(Testimony of Rudolph Nenzel.)

Q. What time did you go out to lunch—twelve?

A. Twelve, maybe before twelve, around 12 o'clock.

Q. How long were Mr. Taylor and Mr. Murrish out of the room on the contract?

A. I don't think they were over fifteen minutes, ten or fifteen minutes.

Q. Then Mr. Taylor came back? A. Yes.

Q. And then the conversation and the platting took place? A. Yes, sir.

Q. And this took place in the room where the drafting board was? A. Yes, sir.

Q. How did they stand?

A. Mr. Poole stood on the width of the table, and Mr. Taylor stood on the right, and I stood on his left.

Q. Now, how is that, I didn't get that?

A. It was a table, the drawing table, the same as this would be the drawing table (illustrating), Mr. Poole was here, David—David Taylor was over here, and I was standing at this end.

Q. Where was Mr. Murrish during these conversations?

A. Mr. Murrish left as soon as he got through.

Q. He didn't come back into the room at all?

A. He did not.

Q. Do you know when he left? A. I do not.

Q. Do you know how long he was dictating the contract? A. I do not.

Q. After he went into the stenographer's room.

(Testimony of Rudolph Nenzel.)

to dictate the contract, [473—468] you didn't see him at all? A. No, sir, I did not.

Q. Now what kind of a drafting table was this, Mr. Nenzel? A. Oh, I am not familiar—

Q. Just describe it, tell us what kind of a table it was?

A. The thickness of the top was I should say inch or inch and a half, somewheres along there.

Q. How high from the ground?

A. Possibly standing about that high. (Illustrating.)

Q. Higher than this table? A. Yes.

Q. Can you give us a diagram of the Taylor offices, and where the drafting table was?

A. I don't know whether I can or not.

Q. Suppose you try. (Witness draws diagram on paper.)

A. There was a hall down this way, and a room in here; as I remember, this was the office where most of the conference took place.

Mr. WHEELER.—Try to indicate it in some way so the record will show it.

WITNESS.—This I call west.

Mr. THATCHER.—(Q.) It don't make any difference which direction. Is that a hall there?

A. An anteroom of some kind.

Q. A hall and rooms on each side, that is it, isn't it? A. Yes.

Q. And one, two, three on this side?

A. I am sure I don't know.

Q. On this side how many rooms are there?

(Testimony of Rudolph Nenzel.)

A. I don't know that.

Q. The room you had most of your conferences in is marked number one; now where was the stenographer's room?

A. Well, as I remember, there was a girl working there, and there was a girl at her desk out here in the hallway, or over there; I don't remember just exactly how it was; in the hallway I believe there was a little settee there for those calling to sit down.

Q. Where was the drafting room? [474—469]

A. As I remember it was over here. (Indicating on diagram.)

Q. Mark that number 3. And you say the stenographer was here; is that correct? A. No.

Q. Mark that number 2.

A. No, she wasn't in sight; there was one girl working in this hallway or anteroom, and I think there was a girl working in here. (Indicating on diagram.)

Q. Mark 4 and 5 the two girls. (Witness marks the points on the diagram.) Four and five represent the places where the girls were; now where was the drafting board?

A. As I remember, it was in number three.

Q. In number three? A. Yes.

Q. Where was Mr. Bancroft's office?

A. Mr. Taylor told us this was Mr. Bancroft's office, and apologized—

Q. That was number one? A. Yes.

Q. Was there a drafting board in number one?

A. No, sir.

(Testimony of Rudolph Nenzel.)

Q. Were there any drawers in the drafting table?

A. I could not say.

Q. After Mr. Murrish left how long was it before you saw the contract?

A. If I remember, the contract was completed about 2 o'clock, shortly after we got there in the afternoon.

Q. Mr. Murrish dictated it, and left, and you folks got it from the stenographer; is that correct?

A. Mr. Taylor brought it.

Q. Mr. Taylor brought it in from the stenographer's room?

A. He brought it in and handed it to us.

Q. Was the contract read at that time?

A. Yes.

Q. Was it discussed any further, or just signed?

A. No, sir, Mr. Murrish read it, said it was all right, and signed it.

Q. Mr. Murrish read it? A. Yes. [475—470]

Q. I thought that Mr. Murrish didn't come back?

A. In the afternoon, certainly he came back for the purpose of signing the contract.

Q. Did he read it over after he came back?

A. Yes, sir.

Q. How long were you there in the afternoon, do you recollect?

A. Possibly an hour, or half hour.

Q. Were there any other remarks made at the time of signing the contract?

A. After we got through signing the contract, I asked Mr. Taylor for an advance of \$10,000, and if

(Testimony of Rudolph Nenzel.)

he granted it we would give him the bonus of 5,000 shares of stock, and he said that was all right.

Q. And gave you the ten thousand?

A. No, as I remember, we drew on him as soon as I got back to Lovelock, or he gave me a check and I cashed it.

Q. And that was an advance without first delivering the security of concentrates under the contract?

A. Yes, sir.

Q. Is this the mine map which was there that time? (Hands to witness.)

A. Yes, sir.

Q. Did you look it over that time?

A. Casually, yes.

Q. Just casually? A. Yes, sir.

Q. Where did this map come from, do you know?

A. Well, Mr. Poole brought it to Denver.

Q. Mr. Poole brought it? A. Yes.

Q. Where did Mr. Poole get it, did you deliver it to him? A. I did not.

Q. Do you know where he got it?

A. Had an engineer make it.

Q. Had an engineer make it? A. Yes, sir.

Q. When did he have the engineer make it, just before you left? A. The map itself?

Q. Yes.

A. No, I believe that was made shortly after we [476—471] started to operate the property.

Q. Well, what part did the engineer make just before you left and went on the Denver; do you

(Testimony of Rudolph Nenzel.)

know whether he made any part of it just before you went?

A. Yes, there was some lead pencil extensions on various levels here, I could not tell you which ones, or how far they were extended.

Q. Were they on the map when you went to Denver? A. Yes, sir.

Q. Didn't you testify a few moments ago that those lead pencil extensions were made after you got to Denver? A. Not on this map.

Mr. WHEELER.—I submit that is not a fair question, or a fair method of examination.

Mr. THATCHER.—I don't think I am unfair to the witness in a matter of that kind. May I have the question?

(Discussion.)

The COURT.—If there is an objection that the question is unfair, I think the record should be read to show just exactly what the witness did say. If you want that rule enforced during the trial I am perfectly willing to enforce it.

Mr. THATCHER.—That is what I did this morning. That was a mere slip in repeating the question in the form I did, if the Court please; I didn't intend to ask an unfair question.

Q. When you got to Denver and on the 2d of April, what maps were used by Mr. Poole and Mr. Taylor?

A. Mr. Poole had this mine map and Mr. Taylor had a photostat.

(Testimony of Rudolph Nenzel.)

Q. Now what did they transform or transcribe from one map to another?

A. They transferred from the mine map which Mr. Poole had on to the photostat which Mr. Taylor had, the extensions of the development work which was put on the mine map by Mr. Huntington before we left Lovelock for Denver. [477—472]

Q. And those were given by Mr. Poole to Mr. Taylor at that time? A. Yes, sir.

Q. Do you know whether or not they had been called to Mr. Taylor's attention previous to that time? A. They were on Sunday.

Q. On Sunday were they scaled off and drawn on to the mine map, Exhibit "Y"?

A. They were already on there when we brought the map to Denver.

Q. Do you recollect who you represented on that trip to Denver?

A. I had power of attorney—I believe the contracts would show who I signed for.

Q. The powers of attorney show who you represented at that time? A. Yes.

Q. Did you also represent the mine?

A. I wasn't authorized by any one.

Q. Did the mine pay your expenses on that trip?

A. Yes, sir.

Q. Mr. Poole's also? A. Yes, sir.

Q. And Mr. Murrish's? A. Yes, sir.

Redirect Examination.

Mr. WHEELER.—(Q.) You spoke of offering a

(Testimony of Rudolph Nenzel.)

bonus of 5,000 shares to plaintiff Taylor for an advance or loan to the company of \$10,000?

A. Yes, sir.

Q. Did he subsequently advance or loan to the company \$10,000? A. Yes, sir.

Q. Did he subsequently receive his bonus?

A. Yes, sir.

Q. That bonus consisted of 5,000 shares of stock?

A. Yes, sir.

Q. Apart from the 62 per cent of that stock that is here involved, do you know whether or not that was the only stock that Mr. Taylor owns or ever has owned in the defendant corporation?

A. Yes, sir, I believe it is.

Q. That is the 5,000 shares standing in his name at the present [478—473] time on the books of the company? A. Yes, sir.

Mr. WHEELER.—That is all.

Recross-examination.

Mr. THATCHER.—(Q.) By the way, Mr. Nenzel, are you a director in the corporation?

A. I am.

Q. And have been since its organization?

A. No, not since its organization.

Q. Since when?

Q. I could tell you by referring to the minute books.

Q. Well, what office do you hold?

A. Secretary.

Q. Will you refer to the book and tell me how

(Testimony of Rudolph Nenzel.)

long you have been director and how long secretary of this company, Nevada Humboldt Tungsten Mines Company, and that will be all.

Mr. THATCHER.—If the Court please, I want to offer in evidence the sketch made by the witness as to the Taylor offices.

Mr. COOKE.—Explanatory of his evidence?

Mr. THATCHER.—Explanatory of his evidence.

The COURT.—It will be admitted.

(The diagram is marked Plaintiff's Exhibit No. 50.)

Mr. THATCHER.—Outside of that, I have nothing.

WITNESS.—Since the 26th day of November, 1917.

Q. You were secretary and director since the 26th day of November, 1917, up to date? A. Yes.

Mr. WHEELER.—Who contributed that 5,000 shares of stock that went to Mr. Taylor's bonus?

Mr. THATCHER.—Object as immaterial.

The COURT.—You may answer the question.

A. All of the stockholders in proportion to the amount of stock they held.

Q. And was that indebtedness or loan of \$10,000 ever repaid to Mr. Taylor?

A. It was. [479—474]

(By Mr. COOKE.)

Q. In this conversation at Denver, Mr. Nenzel, did you hear the latter of Mr. Bancroft making an examination discussed between Mr. Poole and

(Testimony of Rudolph Nenzel.)

Mr. Taylor, or was it discussed by any of you during the various conferences you had there?

A. Mr. Poole discussed with Mr. Taylor regarding Mr. Bancroft making an examination, but I don't remember what discussion they had.

Q. You mean you know it was discussed, but you don't recall what was said?

A. No, sir, I do not.

Q. Do you recall whether the matter of the Morrin pannings was discussed, and what degree of reliability, if any, should be attached to those?

A. Mr.—

Mr. THATCHER.—(Intg.) Just a minute. You can answer that yes or no.

Mr. COOKE.—Answer it yes or no if you heard it discussed. A. I did.

Q. Go on and state what was said, and who did the talking.

A. When Mr. Poole showed Mr. Taylor the mine map—

Q. That is Exhibit "Y"?

A. Exhibit "Y," yes, sir, Mr. Poole explained to Mr. Taylor that the footages of development were accurate, as he could vouch for Mr. Huntington's accuracy in making surveys, but that the assays thereon, or values, were estimates made by Ben Morrin and placed on the map by Mr. Huntington, and Mr. Taylor should take them for what they were worth.

Q. Do you remember what, if any reply Taylor made to that?

(Testimony of Rudolph Nenzel.)

A. He said if they were untrue it would affect Mr. Poole personally in the future, or words to that effect.

Q. Were you down in the mine in the course of your connection with the company; did your duties require you to enter the mine, examine [480—475] it, and know anything about any mine workings? A. I have been down there, yes.

Q. Are you a miner? A. I am not.

Q. What is your business, and what has it been? A. Bookkeeper.

Q. Do you know anything about mining or measuring ore in a mine? A. I do not.

Q. And determining ore from assays, or anything of that sort? A. No, sir.

Q. Had you been down the mine frequently during the period from say January 1st, 1918, to April 1st, 1919?

A. I was not; I might have been down once or twice.

Q. Ever do any panning or testing in any way when you would go down there?

A. Yes, I have made some pannings.

Q. How often had you met Mr. Taylor prior to this present meeting, this meeting of April 1st, 1919? A. I met him once.

Q. Where? A. In Denver, Colorado.

Q. About what time was that?

A. That was May, May 30th, 1919, to April 2d, 1919.

(Testimony of Rudolph Nenzel.)

Q. Prior to April 1st, 1919, had you met Mr. Taylor? A. Yes, in San Francisco.

Q. And when was that?

A. That was in January.

Q. That is in connection with the January 16th contract, when that was under consideration?

A. Yes, sir.

Q. And was that the extent of your acquaintance with him down to April 1st, you had only one meeting with him? A. Yes, sir.

Mr. COOKE.—I think that is all.

Mr. THATCHER.—(Q.) You made some pan-nings down in the mine, did you? A. Yes, sir.

Q. Ever have any assays made? A. No, sir.

Q. Never had an assay? A. No, sir.

Mr. THATCHER.—That is all.

Mr. WHEELER.—That is all. [481—476]

Testimony of H. J. Murrish, for Defendants.

H. J. MURRISH, one of the defendants, called as a witness on behalf of the defendants, after being sworn, testified as follows:

Direct Examination by Mr. WHEELER.

Q. What is your profession, Mr. Murrish?

A. I am an attorney of law.

Q. Where are your offices?

A. Lovelock, Nevada.

Q. How long have you been practicing in Lovelock, Nevada? A. Since 1912.

(Testimony of H. J. Murrish.)

Q. Were you present in Denver, Colorado with Mr. Poole and Mr. Nenzel on the 30th and 31st days of March and the 1st and 2d days of April, 1919? A. I was.

Q. Were you in the office of David Taylor on Sunday, Monday, Tuesday and Wednesday, March 30th, March 31st, April 1st, and April 2d, 1919?

A. I was.

Q. Did you on any occasion in the office of David Taylor, or elsewhere, in the presence of the gentlemen named, or otherwise, say to David Taylor that there was blocked out, in sight and ready for mining and reduction into concentrates over 60,000 tons of scheelite ore which would carry an average of 1.75 per cent tungstic acid? A. I did not.

Q. Did you say that there were over 60,000 tons of scheelite ore in the said mine? A. I did not.

Q. Did you say that there was that quantity of ore in sight? A. I did not.

Q. Did you say that it was blocked out?

A. I did not.

Q. Did you say that it was ready for mining and milling and reduction into concentrates?

A. I did not.

Q. Did you on any of those occasions, on any or either of those [482—477] days, make a statement to the said David Taylor, which in substance or effect was that there were 60,000 tons, or any other quantity of ore in the mine of the defendant, Nevada Humboldt Tungsten Mines Company?

(Testimony of H. J. Murrish.)

A. No.

Q. Did you on any of those occasions say to the said David Taylor that there was in that mine any quantity of ore whatsoever that would go 1.75 per cent tungstic acid, or would average that?

A. No, sir.

Q. On any occasion during that visit to Denver in 1919, did Mr. Poole make a statement in your presence to the said David Taylor to the effect that there was 60,000 tons of ore blocked out, in sight and ready for mining and reduction into concentrates? A. No, sir.

Q. On any occasion in your presence during that visit did Mr. Poole make a statement to David Taylor to the effect that there was any quantity of ore in said mine that would carry an average of 1.75 per cent tungstic acid? A. No, sir.

Q. Did he make any statement in your presence, he the said Poole to the said Taylor, to the effect that there was any quantity of ore in the said mine which would carry an average of 1.75 per cent tungstic acid? A. No, sir.

Q. Did he say to the said Taylor in your presence that there was in that mine any quantity or tonnage of ore whatsoever? A. No, sir.

Q. Did Mr. Nenzel on any occasion make any statement of the kind or character embraced in my questions just asked you concerning Mr. Poole?

A. No, sir.

Q. Did Mr. Nenzel make any statement in sub-

(Testimony of H. J. Murrish.)

stance or to the effect indicated in my previous questions regarding Mr. Poole, as to the said matter of the quantity of ore, and as to the matter of its [483—478] averaging 1.75 in tungstic acid, or either as to the quantity of ore or as to the per cent in tungstic acid? A. Not in my presence.

Q. Did Mr. Poole say to Mr. Taylor at any time during that visit to Denver in 1919, in your presence, that there was over 60,000 tons of ore developed within the or any blocks indicated by the or any lines or pencil lines shown upon the map plate 5, annexed to Exhibit 15?

A. I never saw plate 5 annexed to Exhibit 15.

Q. Answer the question directly, please?

A. No, sir.

Q. Did he make any statement to the effect that there was any quantity of ore whatsoever indicated within blocks on the said Exhibit 5, which would average over 1.75 per cent tungstic acid?

A. No, sir.

Q. With reference to plate 5 annexed to Exhibit 15, have you seen that since you have been in the courtroom during the progress of this trial?

A. I haven't examined it, I have seen it here.

Q. Examine plate 5 annexed to Exhibit 15, and state whether or not you have ever seen that plate before? A No, sir, I have not.

Q. Did you see that plate, or any part or portion of it, in Denver in the year 1919? A. No, sir.

Q. Was any part or portion of that plate pre-

(Testimony of H. J. Murrish.)

pared in your presence in Denver in the year 1919, either by Mr. Poole, Mr. Taylor, or by any other person or persons? A. No, sir.

Q. Did Mr. Poole on that or any occasion in Denver, in 1919, in your presence, say to Mr. Taylor there was 60,000 tons of ore that will average over 1.75 per cent, developed in the mine, referring to the mine of the defendant, Nevada Humboldt Tungsten Mines Company?

A. No, sir.

Q. Was any part or portion of such statement made in your presence to Mr. Taylor by Mr. Poole?

A. No, sir. [484—479]

Q. Or by Mr. Nenzel? A. No, sir.

Q. Was there any opinion expressed by you or in your presence, either by Mr. Poole or by Mr. Nenzel, in substance or to the effect that 60,000 tons of ore was probably not the maximum amount of ore that might be expected in the mine?

A. No, sir.

Q. Were you in San Francisco the early part of June, 1919? A. I was.

Q. On that occasion did you have any conversations with Mr. Taylor, or Mr. Jackson in the presence of Mr. Taylor? A. I did.

Q. State fully and in their sequence, please, what took place at those respective conversations?

A. I met Mr. Jackson and Mr. Taylor in the office of Mr. Bayless, an attorney in San Francisco, on the morning of June 2d, I think it was, it was

(Testimony of H. J. Murrish.)

Monday morning at any rate, in company with Mr. Nenzel, Mr. Poole and Mr. Jones; we went there pursuant to an engagement that we had previously made with them, and Mr. Taylor told us that Mr. Jackson would speak for him. Mr. Jackson opened the conversation by stating that "You people told Mr. Taylor in Denver that there was 60,000 tons of ore in the mine, now Mr. Bancroft reports that there are only 19,000 tons there, so Mr. Taylor does not feel justified in putting the money of his friends into this proposition on the basis of the present contract, and he will have to have it modified." "Now," he said, "we are willing to put up \$75,000 to pay creditors, and we will pay the rest of the debts as soon as the ore is developed that you stated was in the mine."

Q. When Mr. Jackson on that occasion in your presence made the statement with regard to the representations to Mr. Taylor as to the tonnage in the mine, what did you do? A. Nothing.

Q. Did you nod your assent? A. No, sir.

Q. Did you express your assent? A. I did not.

Q. Why? [485—480]

Mr. THATCHER.—Objected to as calling for the conclusion of the witness.

Mr. WHEELER.—(Q.) Did you make any reply whatever to that statement? A. None whatever.

Q. Why not?

Mr. THATCHER.—Objected to as calling for the conclusion of the witness, and immaterial.

(Testimony of H. J. Murrish.)

The COURT.—He need not detail any conversation in the matter; he can answer it otherwise.

A. We had agreed before going to the meeting that there would be no discussion of any matter on our part, that we would simply listen to Mr. Taylor's proposition, and retire and consider it, returning later to discuss the matter with him.

Mr. WHEELER.—(Q.) Was there any word used by Mr. Jackson on that occasion, such as that you had misrepresented to Mr. Taylor, or that you had fraudulently misstated to Mr. Taylor anything?

A. No, sir.

Q. Have you stated all that took place at that meeting, in substance? A. In substance, yes.

Q. When next did you meet?

A. As I recall, it was after lunch on the same day.

Q. What took place when you met on the same day after lunch?

A. Mr. Taylor again started the conversation—

Mr. COOKE.—Who?

A. Mr. Jackson; I don't recall whether he said you admitted or you stated—

Mr. THATCHER.—(Q.) Is this the afternoon of Monday?

A. The afternoon of Monday, to my best recollection. (Contg.) To our folks, stated that there was 60,000 tons of ore in the mine; and I then took issue with Mr. Jackson; and I said, "I made no such [486—481] statement as that," and he said, "Yes, you did," he says, "Your silence was assent." I said, "My silence was not assent in that case be-

(Testimony of H. J. Murrish.)

cause I never made such a statement," and the minute I finished Mr. Nenzel got up, and he said, "I never made such a statement as that either," he says, "I don't understand your terms, but," he says, "I never made such a remark as that"; and while Mr. Nenzel was still talking, Mr. Poole got up and he started in a gentlemanly manner to enter into a discussion, and to—

Mr. WHEELER.—(Q.) Well, what did he say?

A. That he had never made any such statement as that to Mr. Taylor, that there was 60,000 tons of ore in the mine.

Q. What else took place on that day in the afternoon?

A. Well, there followed a discussion then about the modified form of contract, and we stated that it would be absolutely impossible for us to agree to any modification if it did not arrange for the payment of all our debts.

Q. Proceed; tell what was said and done.

A. Well, as I recall it, that was all there was to it; they argued this modification they wanted, and we argued that we could not consider anything that didn't pay all of our debts.

Q. When did you next meet?

A. The next morning.

Q. What took place on that occasion?

A. Well, the next morning—

Q. Which was what day of the week?

A. Tuesday morning. I am not absolutely positive about the sequence of these, because there might

(Testimony of H. J. Murrish.)

have been two meetings in one afternoon, but I am following the sequence of the meetings, and I think it was Tuesday morning.

Q. Give us the first thing you recall?

A. The first thing Mr. Nenzel used as argument was if they only paid \$75,000 worth of our debts we would have no money to operate [487—482] the mine, and it was preposterous to consider such a proposition; then Mr. Taylor said under those circumstances he would advance an additional \$10,000 to work the mine; and Mr. Jackson, as I remember had that morning a sheet of paper on which he had the modifications that he wanted us to assent to.

Mr. WHEELER.—We ask counsel on the other side to produce a sheet of paper such as is described by the witness.

Mr. THATCHER.—We will see if we can find it.

Mr. WHEELER.—This, as I understand it, is the first paper presented, is it?

A. The first paper, yes; it is a single sheet.

Mr. WHEELER.—A single sheet of paper upon which you first outlined your terms, and which preceded the draft of contract.

Mr. JACKSON.—(Q.) Was it in my handwriting?

WITNESS.—Part of it was in typewriting, and part of it in some one's handwriting; I am not familiar with it.

(A short recess is taken at this time.)

Mr. WHEELER.—(Q.) You spoke of Mr. Jackson having a sheet of paper on which was set forth

(Testimony of H. J. Murrish.)

the modifications he wished you to assent to; I hand you a document and ask you whether or not that is the paper referred to by you? A. It is.

Mr. WHEELER.—(Q.) We offer it in evidence, and ask that it be marked Defendants' Exhibit "Z."

(The paper is admitted, and marked Defendants' Exhibit "Z.")

Mr. WHEELER.—(Q.) I observe some handwriting upon the paper Exhibit "Z," whose handwriting is that, if you know? A. I do not know.

Q. Was it there when the paper came into your possession? A. It was.

Q. How and when did the paper come into your possession?

A. It was in use during the discussion, and upon the termination [488—483] of the discussion, Mr. Nenzel took it away with him.

Q. That was on what day?

A. On Tuesday, to the best of my recollection.

Q. What took place at the next discussion?

A. That wasn't all that happened at that one.

Q. Proceed, please.

A. I asked Mr. Taylor this question: I said, "Are you going to exercise your option of April 2d?" He said, "Yes, by paying \$75,000 of the debts, and paying the rest when the mine is developed." "Then," I said, "you are not going to exercise your option?" and he said, "Yes, by paying \$75,000 of the debts and paying the rest when the mine is developed," and I repeated, "Then you are not

(Testimony of H. J. Murrish.)

going to exercise your option?" and he said, "Yes, by paying \$75,000 on the debts and the balance when the mine is developed." So I got up and left the meeting. That afternoon they asked for another conference, and we went back and had another general discussion, and at that meeting I asked them—we discussed the matter of creditors, and we stated we would have to consult our creditors before we did anything, and Mr. Taylor asked to go along with us to see our creditors, and we told him that we didn't figure that he had any business with them, that they were our creditors, and not his; and we discussed that at considerable length, and then finally I asked Mr. Taylor if he would prepare an exact statement of what he wanted to show, that we could submit to our creditors.

Q. To whom, to Mr. Taylor or Mr. Jackson?

A. I don't recall that I addressed it to either one of them, but most likely to Mr. Taylor, because he was the principal. At any rate, Mr. Jackson stated that they would submit to us a detailed plan of what they wanted, the modification of the April 2d option that they insisted upon; and there was nothing further, as far as I was concerned, until Friday, right after lunch; at that time Mr. [489—484] Nenzel, Mr. Poole, Mr. Jones and myself were going to a ball game; Mr. Jones and I were in a taxi outside of the Palace Hotel waiting for Mr. Nenzel and Mr. Poole; and after waiting quite a while I got out and went in to see why the delay, and Mr. Nenzel and Mr. Poole were talking to Mr. Taylor

(Testimony of H. J. Murrish.)

and Mr. Jackson, and they all came out to the taxi, and said they thought that was a pretty poor time to be going to ball games, that we ought to get together and try to come to some agreement; I said as far as I was concerned there was no agreement we could come to; so Mr. Jones and I went on to the ball game. When we returned, Mr. Nenzel handed me a copy of the proposed contract.

Q. I hand you Plaintiff's Exhibit Number 16, and ask you if the document so handed to you is that identical document, or whether or not that, if you can recall it, is substantially the same document?

A. I should say not; this is dated April 2d, and it is executed.

Q. Oh, I beg your pardon; I have the wrong agreement. I hand you Plaintiff's Exhibit 17, and will ask you some questions with reference to that. (Hands to witness.) A. That is a copy of it, yes.

Q. You say it was handed to you by Mr. Nenzel?

A. Yes.

Q. What did you do with it, when the copy of Exhibit 17 was handed to you?

A. I glanced it over. When Mr. Nenzel handed it to me he brought me a message from Mr. Jackson.

Q. What did Mr. Nenzel say?

A. That Mr. Jackson wanted me to look it over and—

Mr. THATCHER.—I object to what Mr. Nenzel said.

The COURT.—I think that objection is good.

(Testimony of H. J. Murrish.)

Mr. WHEELER.—We will connect it up, your Honor, if it is admitted subject to objection. [490—485]

Mr. THATCHER.—With that understanding, with the right to strike.

Mr. WHEELER.—Yes.

A. (Contg.) And said Mr. Jackson referred it to me to put on any additions that we wanted, or to make any corrections or modifications of it, and that he asked that we all come up to Mr. Bayless' office after dinner that evening.

Q. Did you go to Mr. Bayless' office?

A. We did, but not that evening.

Q. When?

A. Right immediately; Mr. Nenzel called up the office—that was before dinner—and asked if we could be seen then.

Q. Did you take the document, a copy of Exhibit 17, with you?

A. We did, Mr. Nenzel, Mr. Poole and myself; Mr. Jones was not present.

Q. Who was present on that occasion?

A. Mr. Nenzel, myself, Mr. Taylor and Mr. Jackson; I am not positive as to whether Mr. Bayless was there or not, but I think he was.

Q. What was said on that occasion; give the substance?

A. Mr. Taylor asked me if there were any changes that I wanted made in the agreement, and I said absolutely none; that in submitting that proposition

(Testimony of H. J. Murrish.)

to the creditors I wanted it to be wholly Mr. Taylor's proposition.

Mr. THATCHER.—I move to strike out "that in submitting that proposition to the creditors I wanted it to be wholly Mr. Taylor's proposition." Is that your statement?

A. I told Mr. Jackson; he asked me to make the changes, and I told him why I had none to make.

Mr. THATCHER.—I withdraw the objection.

WITNESS.—I then asked him if that was the form in which he [491—486] wanted it submitted, and he said that if we had no objections that there were one or two other clauses that he would like to put into the contract, and that if we would leave the copy with him he would make the changes; and Mr. Nenzel said that he would not leave the copy, but that Mr. Jackson could make the changes and leave them in Mr. Nenzel's hotel box in the Palace Hotel, when he had finished them; and we then left the meeting.

Mr. WHEELER.—(Q.) Were any changes, or proposed changes, or documents relating thereto, subsequently left in the hotel box?

A. There were.

Q. Examine the two sheets which I now hand you, and state whether or not that is the original document so left in the box, to which you referred?

A. That is one of the copies that was left in the box.

Q. Two copies were left in the box?

A. There were.

(Testimony of H. J. Murrish.)

Mr. WHEELER.—We offer the document in evidence.

(The document is marked Defendants' Exhibit "A-1.")

Mr. WHEELER.—(Q.) This was on Friday night, as I understand you?

A. This was on Friday about 6 o'clock.

Q. When next did you see the plaintiff or his counsel, or either of them?

A. I saw them about noon the next day.

Q. Where?

A. In the office of Freitag & Ainsworth.

Q. Up to this time, at any stage of the proceedings, had you or had either of the other defendants said in your presence, that you or they or either of them, agreed and assented to the proposed contract, Plaintiff's Exhibit 17, or Plaintiff's Exhibit 17 as modified by the addendum, Defendants' Exhibit "A-1"? A. No, sir.

Q. Had you in fact assented thereto?

A. No, sir.

Q. Had you, or had any one in your presence at any time prior to this meeting that Saturday, agreed to David Taylor or to his counsel, [492—487] Mr. Jackson, that you would advocate the adoption of that agreement in the creditors' meeting? A. No, sir.

Q. When you went to the creditors' meeting what took place; did you see Mr. Jackson or Mr. Taylor there?

A. I did, but not at the opening of the meeting.

(Testimony of H. J. Murrish.)

Q. Did you see Mr. Bayless, one of Mr. Taylor's counsel there? A. He was there.

Q. All during the meeting?

A. All during the meeting.

Q. State what took place during the meeting.

Mr. THATCHER.—I object, and move to strike out his conclusion that Mr. Bayless was there as attorney for Mr. Taylor. If they want to show Mr. Bayless was there, I don't object, but when they assume he was there as Mr. Taylor's attorney, I do object to that.

The COURT.—That may go out; Mr. Bayless may remain; "one of Mr. Taylor's counsel" may be stricken.

Mr. WHEELER.—(Q.) Proceed, please; what took place at the meeting?

A. I called the meeting of the creditors to order, and stated briefly the object of the meeting; that we were indebted in a large sum of money to them, and that our indebtedness was rapidly maturing, and that we were anxious to pay our debts, or to secure the creditors in the payment, and that we were dealing with Mr. Taylor, who had submitted a proposition to us concerning the mine, but that we felt we were in the hands of our creditors, that if not legally, we were morally, the property was theirs, and that we would be governed wholly by whatever action they took at the meeting. I then told them that Mr. Poole would address them on the state of our affairs, and the chances and the likelihood of our liquidating our debts. Mr. Poole

(Testimony of H. J. Murrish.)

made such a statement, after which I read the proposed contract with the addenda. [493—488]

Mr. COOKE.—That is this Exhibit 17?

A. That is Exhibit 17.

Mr. WHEELER.—(Q.) And the addenda, Exhibit “A-1”?

A. And the addenda, Exhibit “A-1.” When I had gotten part way through this proposed contract, Edson Adams, one of the creditors, got on his feet, and said “We have heard enough of that.” Several of the other creditors, however, said “Oh, let’s hear it all, let him finish it,” and so I completed reading the proposed contract, with the addenda, after which there ensued a general discussion, in which Mr. Taylor’s name was mentioned, and Mr. Bayless got up, and he said he thought it was not right to discuss Mr. Taylor not in his presence, and that he ought to be at the meeting. Mr. Adams said “We don’t want to see him,” but one of the other creditors said, “Oh, let him come in,” so Mr. Bayless called Mr. Taylor, and within a very few minutes both Messrs. Taylor and Jackson came into the room. The creditors then catechised Mr. Taylor. The first question, as I remember it, being asked him was whether or not he considered himself a creditor of the Nevada Humboldt Tungsten Mines Company; Mr. Taylor says yes, and Mr. Jackson says no; and then the next question asked was whether or not Mr. Taylor was willing to take the concentrates which we had put up with him as security for the money he had advanced in payment

(Testimony of H. J. Murrish.)

of the loan, and call it square; Mr. Taylor says yes and no; he said, "If this deal goes through, yes; but if the deal does not go through, I don't know yet what I will do."

Q. What further was said or done at that meeting?

A. That is all that I recall now. The meeting became quite general at that point, and a committee of the five largest creditors was appointed to represent the rest of the creditors to look into the matter, and see what should be done with respect to our debts. [494—489]

Q. Did the creditors, or any or either of them, or their or either of their representatives, at that meeting assent to the contract, Exhibit 17, or Exhibit 17 as modified by Exhibit "A-1"?

A. Not a single creditor.

Mr. WHEELER.—I perhaps should call your Honor's attention to the fact that Exhibit "A-1," which I did not read, provides for 95 per cent of the creditors of the corporation to assent before it becomes operative.

Q. Did you, or did any defendant to your knowledge, ever assent, either conditionally or otherwise, to the execution of the agreement, Exhibit 17, or Exhibit 17 as modified by Exhibit "A-1"?

A. They did not agree to the execution of that contract with the addendum; however, there was this condition, that if our creditors insisted on our signing it, we would, but that was the only condition.

(Testimony of H. J. Murrish.)

Q. That was said? A. Yes.

Q. When? A. That was said Friday evening.

Mr. THATCHER.—To whom?

Mr. WHEELER.—(Q.) Counsel would like to know to whom that was said?

A. Now, perhaps I had better modify that; all during the week we said anything our creditors insisted on our doing, we would do; I won't state positively that that was said Friday evening after we got the contract, because I can't recall any of our conversation.

Q. The majority of your creditors had given an extension of time up to a certain date, hadn't they?

A. Yes, sir.

Q. What date was that?

A. As I recall it, it was July 1st, or July 15th; I don't want to state that with authority, because the secretary knows the date of the extension.

Q. In the course of Mr. Jackson's talk on any occasion was there any discussion in your presence as to who the officers of the [495—490] proposed new corporation should be?

A. There was no discussion as to officers made in my presence, or that I knew anything at all about.

Q. Was there any suggestions made in your presence that Mr. Poole was to be in charge of operations in the mine? A. No, sir.

Q. You recall no such statement being made in your presence? A. No, sir.

Mr. WHEELER.—I think, gentlemen, since you

(Testimony of H. J. Murrish.)

have brought it out in evidence, we will admit that the statement was made by some one in the course of these negotiations, whether the witness was present or not, Mr. Poole was to be in charge of operations at the mine, as testified to by Mr. Jackson; so that fact will stand admitted, but not that it was made in the presence of the witness.

Q. Was there any occasion when you knew that these gentlemen had a meeting when you were not present? A. Only the meeting Friday afternoon.

Q. You were not present at that meeting?

A. I was not present at that meeting.

Q. So far as you know, who was present at that meeting? A. Mr. Nenzel and Mr. Poole.

Q. Now was it ever suggested by any person in the course of any of these conversations that Mr. Poole had wilfully and falsely misrepresented to Mr. Taylor the quantity of ore in that mine, and that he was therefore a man unfit to be in charge of operations at the mine?

A. There never was any such statement made.

Q. Was anything said in the course of those conversations that Mr. Poole had attempted by fraudulent representations to induce Mr. Taylor to enter into the contract of the 2d day of April?

A. There was not.

Mr. WHEELER.—You may take the witness.
[496—491]

Cross-examination.

Mr. THATCHER.—(Q.) My understanding, Mr. Murrish, is that in all of the times you were in

(Testimony of H. J. Murrish.)

Denver, so far as you were concerned, there were no representations or statements of any kind made by either yourself, Mr. Nenzel, or Mr. Poole, as to the amount or character of the ore in the mine?

A. Not in my presence, no.

Q. And that the contract itself was prepared by you? A. No, sir.

Q. I mean dictated by you, is that correct?

A. It was redrafted, is a better word.

Q. Well, it would not have recognized itself after you got through with it, would it? A. Oh, yes.

Q. Do you mean to say the substance was there, the same as before?

A. Yes, there was only one change in particular, that I recall, that I wanted in the contract, that wasn't there; and that was that it should carry with it the option of January 16th so that it would expire a month earlier.

Q. And that was put in?

A. That was put in; that was the only change.

Q. How much of the time were you in the offices with Mr. Poole, Mr. Nenzel and Mr. Taylor?

A. Well, it is rather difficult to state the proportion of the time.

Q. You were not there all of the time, though?

A. No.

Q. You never read the Bancroft report?

A. No, I never saw it.

Q. You had never seen it until you got here, had you, or never read it? A. No.

(Testimony of H. J. Murrish.)

Q. Now you went to San Francisco about June the 2d, is my recollection?

A. We left on June 1st and got there June 2d.
[497—492]

Q. At that time you had a meeting at which Mr. Jackson was present, and at which Mr. Jackson stated the facts that he considered, or misrepresentations as to the ore had been made?

A. No, he didn't say that; he quoted what had been stated; he didn't say they were misrepresentations.

Q. He stated that it had been represented to Mr. Taylor that 60,000 tons of ore were in the mine, and that upon examination of Mr. Bancroft's report there were only 19,500 or 20,000 tons?

A. He said, "You people told Mr. Taylor that there were 60,000 tons of ore in the mine."

Q. My recollection is you didn't say aye, yes, or no to that statement in the first occasion?

A. I did not.

Q. Nor did any of the other defendants who were present? A. No.

Q. Now after the various conversations with reference to that matter had taken place, Mr. Jackson put to you the proposition of modified terms, did he not? A. In the same conversation.

Q. Then this was brought out afterward, wasn't it? A. Yes, that was brought out afterwards.

Q. Defendants' Exhibit "Q"? A. Yes.

Q. And that was the one which he handed to you?

A. Yes.

(Testimony of H. J. Murrish.)

Q. Now didn't Mr. Jackson after he drew the contract, this contract Exhibit number 17, didn't he say to you that you could make any changes, additions, or modifications which you desired?

A. Yes.

Q. In other words, what he was getting at, as you understood, was the substance of the first paper?

A. I don't know what he was getting at.

Q. Is not that the way you understood it in the negotiations? A. No. [498—493]

Q. But he did tell you that you could make any modifications, changes, or alterations in Exhibit number 17, that might be desired? A. Yes.

Q. And this paper, Exhibit "Q" is the proposition which he put up to you at that time?

A. No.

Q. Or before that time? A. Before that.

Q. Did you take that with you; was that handed to you, or to whom was it handed?

A. No, it was handed to Mr. Nenzel.

Q. It was handed to Mr. Nenzel? A. Yes.

Q. What did you do after you got it, did you go over it and discuss it?

A. As I recall it there was no discussion in my presence.

Q. You read it at that time, did you?

A. I don't know whether I read it after I left the meeting or during the conversation there, but I passed it right out of my mind as soon as I read it.

Q. But you did read it at that time?

(Testimony of H. J. Murrish.)

A. I think I did.

Q. And you have identified this as being the proposition that was put to you folks there at that time? A. That was the first proposition.

Q. That was the first proposition? A. Yes.

Q. And that was the thing, the proposition which resulted in this draft of this contract?

A. I don't know what it resulted in.

Mr. WHEELER.—That calls for the conclusion of the witness, I object.

Mr. THATCHER.—(Q.) When did you first see that paper, Mr. Murrish?

A. I should say it was some time on Tuesday, whether Tuesday morning—or Tuesday afternoon.

Q. Tuesday, what date?

A. That would be the 3d, wouldn't it?

Q. Well, I am asking you.

Mr. COOKE.—You are talking about Exhibit "Q"? [499—494]

Mr. THATCHER.—Yes, the paper marked Exhibit "Q."

WITNESS.—Some time Tuesday, whether the 3d or the 2d of June, I don't know.

Q. Who had it at that time?

A. It was being handed about through the meeting; there were six or seven of us in the office, and it was there in front of all of us.

Mr. DAVIS.—(Q.) Whose handwriting is that?

Mr. THATCHER.—Just a minute, if you please, Mr. Davis, until I get through with this examination.

(Testimony of H. J. Murrish.)

Q. It was handed around amongst the meeting, was it? A. Yes.

Q. You and Mr. Nenzel and Mr. Poole, and who else, Mr. Jones? A. Yes, Mr. Jones was there.

Q. Mr. Jones was there, and your best recollection is that that was passed around at the meeting?

A. No, Mr. Thatcher.

Q. Well, what was it, Mr. Murrish?

A. There were six or seven of us sitting around two tables in Mr. Bayless' office, and this was on the desk; now there was a general discussion, probably two or three of us talking at once.

Q. In whose handwriting is that?

A. I haven't any idea.

Q. That handwriting was on there at the time, wasn't it? A. Yes.

Q. Was this interlineation, just after 1.75?

A. Yes.

Q. And ahead of 03? A. Yes.

Q. On there? A. Yes.

Q. Were the words "preferred stock" crossed out, and "bonds" substituted at that time?

A. Yes.

Q. And that was the proposition that was made at that time? A. Yes.

Q. Did you ever see my handwriting, Mr. Murrish? A. No, sir, I never have. [500—495]

Q. Did you know anything about me in this transaction at that time? A. No, sir.

Q. When did you first hear about me in this transaction?

(Testimony of H. J. Murrish.)

A. I believe the first time that I heard about you was when you sent a notice to the stockholders' meeting.

Q. When I sent a notice to the stockholders' meeting? A. Yes, I am not sure about that.

Q. You are confident that is the paper, though, that was presented at that time?

A. I am satisfied it is.

Q. You are absolutely satisfied of that?

A. Yes, sir.

Mr. THATCHER.—That is all.

(By Mr. COOKE.)

Q. Mr. Murrish, in regard to this meeting in Denver, there is a document here known and referred to as Exhibit "B," on two sheets, on which are some computations made by Mr. Taylor and Mr. Poole, at least by Mr. Taylor, and discussed with him by Mr. Poole; do you remember that document being used down there in conversation?

A. In Denver?

Q. Yes. A. Yes, sir.

Q. And the map referred to by Mr. Poole, and marked Exhibit "Y," do you know what that is, did you see that here in court? A. Yes.

Q. Was that used down there in the discussions and conferences? A. Yes.

Mr. THATCHER.—Might I interrupt a moment. I would like to correct the record. This paper which I have shown you and referred to as Exhibit "Q," is Exhibit "Z," is it not?

A. If this is a "Z," it is Exhibit "Z."

(Testimony of H. J. Murrish.)

Mr. THATCHER.—I ask that the record show the correction; that the paper referred to is Exhibit “Z.” [501—496]

Mr. COOKE.—That is the paper you asked the witness about in the concluding portion of his testimony?

Mr. THATCHER.—Yes.

Mr. COOKE.—(Q.) Did you have a conversation with Mr. Taylor at the Brown Palace Hotel at Denver, in reference to your refusal to sign this agreement when that matter was discussed?

A. Where what matter was discussed?

Q. Your refusal to sign this agreement of April 2d? A. Yes.

Q. I wish you would state what took place at that time.

A. Well, practically all that took place at that time was that Mr. Taylor said I had given my word to him that I would sign it, and I said that I had not given my word, but if he said I had, that I would sign it.

Q. Were Mr. Nenzel and Mr. Poole there with you at that time? A. Yes.

Q. In the conversation at this Denver conference, or any of those conversations, did you hear the subject matter of Bancroft making any further examination of the property mentioned by either Mr. Taylor or Mr. Poole? A. No, sir.

Q. Did you hear the subject matter or the results of the Morrin sampling being put upon the mine map being discussed by either of them?

(Testimony of H. J. Murrish.)

A. No, sir.

Q. In reference to this document marked Plaintiff's Exhibit 17, being the proposed contract of June 2d, proposed by Mr. Taylor at San Francisco, was it suggested by anybody down there in your presence that you prepare that document, or that you have anything to do with the preparation of it before it was finally drafted? A. Yes.

Q. Well, who was it said anything on that subject, and what was said? [502—497]

A. Mr. Taylor had prepared a form of contract, and I objected to it in the form in which it was presented to me, and he said, "Well, you go ahead and dictate it."

Q. Is this the contract down in the San Francisco meeting? A. No, this is the April 2d.

Q. No, I am talking about the San Francisco meeting, and ask you the question whether or not you were notified by Mr. Taylor, Mr. Jackson or anybody, to have anything to do with the preparation of that proposed contract, which was afterwards submitted and read at this creditors' meeting? A. No, sir.

Q. At the time Mr. Poole addressed the creditors' meeting with reference to the contract proposed by Mr. Taylor, what, if anything did Mr. Poole do in regard to advising the creditors for or against the acceptance of that contract; what did he say?

A. He simply told the condition of the company, the condition of the mine, and told the probability of our being able to pay our debts.

(Testimony of H. J. Murrish.)

Q. Did he in that meeting express any opinion with reference to the advisability of accepting the contract or not; if so, state what he said?

A. He did not; he didn't advise the acceptance or rejection of either one.

Q. Did he say anything with regard to whether the contract was a harsh or unconscionable one, or otherwise?

Mr. THATCHER.—I object to the question as leading.

The COURT.—It is leading, but he may answer it.

A. Well, he probably said it was hard and unconscionable, but that was no reason for the creditors signing it.

Mr. COOKE.—That is all.

Mr. THATCHER.—That is all. [503—498]

Mr. THATCHER.—If you want the files in this other case, we will admit that they are offered and considered.

Mr. COOKE.—You mean in case 2263?

Mr. THATCHER.—Subject to our objection.

Mr. COOKE.—In support of the separate defense, the answer of both the defendants in reference to the matter of the suit commenced on August 16th, 1919, by David Taylor against C. W. Poole and others, case number 2263, as constituting an election and bar to this suit; you say you will admit the copies pleaded?

Mr. THATCHER.—I will admit those are pleadings, and merely make the objection that they do

not constitute a proper defense or any defense to the action at bar.

Mr. COOKE.—We will offer in evidence the bill of complaint, the original document, and ask to substitute a certified copy.

Mr. THATCHER.—No objection to that.

The COURT.—They will be admitted, but the objection of Mr. Thatcher will be considered.

(Bill of Complaint in case No. 2263 is marked Defendants' Exhibit "A-2.")

Mr. COOKE.—We also offer in evidence for the same purpose, and in connection with the last exhibit, the answer of defendants Poole, Nenzel and others, filed March 18th, 1920.

Mr. THATCHER.—That is the damage case?

Mr. COOKE.—Yes.

Mr. THATCHER.—Same objection, if the Court please.

The COURT.—You offer it for the same purpose?

Mr. COOKE.—Yes.

The COURT.—That is offered simply and solely on the question of election.

Mr. COOKE.—Yes, sir. [504—499]

(The answer of Poole, Nenzel, Murrish, et al., in case No. 2263, is marked Defendants' Exhibit "A-3.")

Mr. COOKE.—We offer in evidence the reply of the plaintiff, filed April 12th, 1920, in connection with the other exhibits, and for the same purpose.

The COURT.—In connection with the other exhibits?

Mr. COOKE.—The other exhibits immediately preceding.

(The reply of the plaintiff, David Taylor, in case No. 2263, is marked Defendants' Exhibit "A-4.")

Mr. COOKE.—The balance of this record seems to be stipulations, and I don't know that they have any bearing in the case; and I don't know that I care to offer them.

Mr. THATCHER.—If your Honor should consider them on the question of election, I think with the question of election is the question of laches, also pleaded with it; and if your Honor should conclude those matters constitute a part of the defense, or if any laches is shown in that matter, we would like to have the stipulations also considered.

Mr. COOKE.—No objection if you want them in.

The COURT.—This is not offered on that question, is it. Are these pleadings offered for any other purpose than on the question of election?

Mr. COOKE.—On the question of election is all I am offering them.

Mr. WHEELER.—I think they should be in for every purpose, your Honor. I take it when a plaintiff comes in and sues for damages in a case of this character, independent of the doctrine of laches, where he knows a contract has been made, and knows thousands of dollars are being paid on, and he waits for months, and months and months, until after thousands of dollars have been paid before commencing his suit, it is evidence of laches. [505—500]

The COURT.—I think that should be admitted as the date when you commenced your suit; but the doctrine of laches, as I understand, is only urged as against this suit, and the date of this suit is here now.

Mr. WHEELER.—Upon that proposition, your Honor, all that the plaintiff has done, all his affirmative actions after knowledge of the Loring contract, would go to the question of his laches.

The COURT.—It may go in then for that purpose; I will consider that.

Mr. COOKE.—For whatever purpose it may be competent.

The COURT.—As far as I think it is worthy. Do you want to argue the question of laches now?

Mr. WHEELER.—We are prepared to argue it at any time.

The COURT.—You had better have some evidence first.

Mr. WHEELER.—I think perhaps it would be better. We will proceed and finish the testimony. With reference to resolutions, and those matters, appearing in the documents, perhaps counsel will agree that the documents may be received in evidence?

Mr. THATCHER.—I think so.

Testimony of J. T. Goodin, for Defendants.

Mr. J. T. GOODIN one of the defendants, called as a witness, after being sworn, testified as follows:

Direct Examination by Mr. WHEELER.

Q. What is your occupation, Mr. Goodin?

A. I am cashier of the First National Bank of Lovelock.

Q. Do you reside in Lovelock? A. Yes, sir.

Q. For how long a period of time have you been president of the First National Bank at Lovelock?

A. Cashier.

Q. Or cashier, I mean.

A. Since 1911, I think. [506—501]

Q. Do you know the plaintiff Taylor in this action? A. I have met him.

Q. You are one of the defendants in the action, are you? A. Yes, sir.

Q. Do you know Mr. Jackson, one of the plaintiff's attorneys in this case? A. I have met him.

Q. Do you recall a conversation that you had with Mr. Taylor and Mr. Jackson on or about the first day of June, 1919? A. Yes, sir.

Q. Where did that conversation take place?

A. In their room in the Big Meadow Hotel at Lovelock.

Q. Did you on that occasion say either to Mr. Jackson or to Mr. Taylor, or to both of them, that you had been fooled in the matter of the mine of the defendant Nevada Humboldt Tungsten Mines Company? A. No, sir.

(Testimony of J. T. Goodin.)

Q. On that occasion or on any other occasion at or about that time, did Mr. Taylor or Mr. Jackson say to you in the presence of the other at Lovelock, in the Big Meadow Hotel, or elsewhere, that Mr. Poole had represented to Mr. Taylor that there were 60,000 tons of ore in the mine of the said Nevada Humboldt Tungsten Mines Company, and that Mr. Bancroft now reported only 20,000 tons of commercial ore?

A. I don't remember of hearing any definite statement as to tonnage.

Q. Was there said, in substance or effect, that Mr. Bancroft had not found as much ore in the mine as was expected, or any words to that effect?

A. Yes, I think one or the other of them said that.

Q. When that was stated did you either by silence or orally, assent to the statement as being a statement of fact as to any representations made regarding the question of ore in the mine, to Mr. Taylor?

A. No, sir, I knew absolutely nothing about it whatever.

Q. Had you ever represented or stated or informed Mr. Taylor that [507—502] there were 60,000 tons of ore in the mine, or any other number of tons of ore?

Mr. THATCHER.—Mr. Wheeler, you need not proceed along that line. We don't contend Mr. Goodin ever represented there was anything in the

(Testimony of J. T. Goodin.)

mine, or made any statements at all as far as he was concerned, excepting as it may be through power of attorney.

Mr. WHEELER.—I think that is legitimate, your Honor, because it is alleged that these representations were falsely made and fraudulently, by the three persons named, while acting for these other stockholders.

The COURT.—Go on.

(By direction the reporter reads the question.)

A. I had not.

Mr. WHEELER.—(Q.) Did you ever know of any person, either Mr. Nenzel, Mr. Poole, Mr. Murrish, or any other person, making any statement to Mr. Taylor with regard to the tonnage of ore in the said mine or mines?

A. I did not—I have not.

Q. Did you ever know of Mr. Poole or Mr. Murrish, or Mr. Nenzel making any statement to Mr. Taylor regarding the value or contents in tungstic acid of the ore in the said mine?

A. No, sir, I have not.

Q. Did you ever admit or say anything to Mr. Jackson or Mr. Taylor to the effect that any such statement ever had been made by any person to Mr. Taylor at any time? A. No, sir.

By Mr. COOKE.—(Q.) Mr. Goodin, you answered Mr. Wheeler by saying that you did not recall anybody mentioning the figure 60,000 tons in that conversation which you had with Mr. Jack-

(Testimony of J. T. Goodin.)

son and Mr. Taylor at Lovelock; are you able to state whether those figures, 60,000 tons, were mentioned at all in that conversation by anybody?

A. Well, to the best of my recollection, there was no definite [508—503] amount stated, but I think that they said, one or the other of them, that Mr. Bancroft had not found as much ore as they thought was there, something to that effect; I can't remember the exact words.

Q. But you don't recall any 60,000 tons mentioned in the conversation at all?

A. I don't remember it.

Q. Did you attend the creditors' meeting in San Francisco shortly after this talk you had at Lovelock? A. Yes, sir.

Q. What creditor or creditors did you represent?

A. Well, I represented the First National Bank at Lovelock, and the Continental National Bank at Salt Lake City.

Q. Were you there at the time Mr. Poole and Mr. Murrish addressed the creditors' meeting?

A. Yes, sir.

Q. I wish you could state briefly just what took place, as you recall it?

A. Well, I believe Mr. Poole spoke first, I am not sure, though; and it was as to the condition of the mine, and as to what they could do—I don't know which one of them did go first, but anyhow Mr. Poole talked along the lines they could pay out the debt; the creditors asked them a good many

(Testimony of J. T. Goodin.)

questions, and that was the substance of what he had to say, outlining the way that they could work out of debt, if tungsten stayed at a certain price.

Q. Was some proposed contract with Taylor brought before the meeting?

A. Well, Mr. Murrish read that contract; I don't know whether he read that before Mr. Poole talked, or whether it was afterwards, but Mr. Murrish read that proposed contract; and as I remember it, when he finished and made the statement that we don't want to sign this contract, but we will sign it if our creditors demand it, he says, "We are in the hands of our creditors."

Q. What did the creditors say about it?

A. Well, they didn't seem to take very much stock in it.

Q. Did you hear any of them express any opinion there in regard to [509—504] it at the time that Mr. Jackson or Mr. Taylor were there?

A. Well, as I remember it, the most of this conversation in regard to it was before they were sent for. There was quite a bit of talk among the creditors, and then they sent for Mr. Taylor, but I didn't hear any creditor express himself being in favor of the company signing such an agreement as that; and all of them that I did hear express themselves, expressed themselves as being opposed to it; and I represented the largest line of credit there was there, and I certainly was opposed to any agreement of that kind being signed.

(Testimony of J. T. Goodin.)

Q. Was the subject of anybody trying to buy the accounts against the Nevada Humboldt Tungsten Mines Company discussed in the creditors' meeting?

Mr. THATCHER.—Objected to as incompetent, irrelevant and immaterial.

Mr. COOKE.—(Contg.) At the time when Mr. Jackson or Mr. Taylor were present?

Mr. THATCHER.—Objected to as incompetent, irrelevant and immaterial, and not constituting a defense to the action.

Mr. COOKE.—We think it is proper, if the witness knows anything about it, to show what the conversation was; and we rather think it is competent as showing the motives and purposes actuating the plaintiff Taylor at that time; it seems to me it would throw some light upon his motives and his purposes.

The COURT.—We can probably understand his motives. Every man in a deal of that kind is trying to do the best he can for himself, but will this show anything more than that?

Mr. COOKE.—Well, I think it will show confidence on his part that he was not advancing a fair proposition, and that he would have to get something else by way of coercion to compel these people to accept it; that is our theory. The purpose in offering [510—505] the testimony is to show that this man Taylor was trying to buy up all the accounts he could against the company,

(Testimony of J. T. Goodin.)

with the idea of using the power which that ownership would give him to force the company to accept a proposition they would not otherwise accept.

(Discussion.)

The COURT.—I will let the testimony in, but it may be argued.

(The reporter reads the question.)

A. I don't believe it was; I don't recall it.

Mr. COOKE.—I think that is all.

Mr. THATCHER.—That is all.

(At 4:15 o'clock P. M. Court adjourns until Wednesday, September 22d, 1920, at 10 o'clock A. M.)

Wednesday, September 22d, 1920.

Court convened, 10:00 o'clock A. M.

Mr. J. T. GOODIN, recalled for further direct examination.

Mr. WHEELER.—(Q.) Mr. Goodin, are you familiar with the contract entered into between the defendant Loring and the defendant Nevada Humboldt Tungsten Mines Company, and others?

A. Yes, sir.

Q. You were a party to the contract?

A. Yes, sir.

Q. Do you know whether or not the payments called for by that contract were made by Mr. Loring at the time and in the manner called for by the contract?

A. Yes, sir, every one of them has been made right on time, or a day or two in advance.

(Testimony of J. T. Goodin.)

Q. Do you recall what the total amount is that has been paid in by Mr. Loring under the terms of that contract?

A. Well, the contract called for three—

Mr. THATCHER.—Answer the question.

[511—506]

A. Well, I can tell you.

Mr. WHEELER.—(Q.) It is a mere matter of computation; you don't recall offhand? A. No.

Q. But they all have been made at the times indicated in the contract, have they?

A. Absolutely, yes, sir.

Q. What has been done by the respective corporations defendant in the matter of the payment of their debts?

A. They have paid them all.

Q. Out of what money?

A. Out of the money received from Mr. Loring.

Q. Among the debts paid by the said corporation out of the moneys received from Mr. Loring, has any payment been made to the plaintiff David Taylor?

Mr. THATCHER.—Objected to as calling for the conclusion of the witness, incompetent, irrelevant and immaterial.

The COURT.—He can tell what has been done.

A. Yes, sir, it has.

The COURT.—Well, that may go out. Just tell what has been done with reference to any claims that Mr. Taylor had against any of these companies; just tell the fact.

(Testimony of J. T. Goodin.)

Mr. WHEELER.—(Q.) Are you familiar with a suit brought by Mr. Taylor against the Nevada Humboldt Tungsten Mines Company in this court to recover something above \$9,000?

A. I thought it was seven thousand and something.

Q. Well, you are speaking now of the amount for which the suit was settled, perhaps.

A. Yes, sir.

Q. You remember that he did bring a suit, claiming a balance due under his contract, advances made by him pursuant to the contract that is annexed to the complaint in this action, marked Exhibit "A"?

A. Yes, sir. [512—507]

Q. I hand you a cancelled check, dated December 15, 1919, for \$1,000, drawn in favor of Norcross, Thatcher & Woodburn, and ask you whether or not you have ever seen that check before?

A. Yes, sir, I have.

Q. What was done with that check?

A. That check was mailed to French & Gibbons at that time at Reno, and by them turned over to the attorneys for Mr. Taylor.

Q. Did you ever receive a voucher from the attorneys for Mr. Taylor?

A. Well, it came direct back to the office, this voucher did.

Q. Do you recognize the document which I now place in your hands purporting to be signed by Norcross, Thatcher & Woodburn, as the voucher so received? A. Yes, sir.

(Testimony of J. T. Goodin.)

Q. Is it a voucher for that particular check?

A. Yes, sir; it is numbered on the back the same as the check is.

Mr. WHEELER.—We offer the check and the voucher in evidence, and ask that they be marked respectively Defendants' Exhibits "A-5" and "A-6."

Mr. THATCHER.—We object on the ground it is irrelevant and immaterial to any of the issues in the case, and does not constitute or tend to prove any defense.

Mr. DAVIS.—I suggest you read the endorsements in the offer.

Mr. THATCHER.—Oh, we admit the endorsements.

Mr. WHEELER.—Counsel says he admits the endorsements, which I will read; "Pay to the order of David Taylor," signed, "Norcross Thatcher & Woodburn; pay to the order of the Colo. National Bank," signed, "David Taylor." The money being immediately traced into the hands of David Taylor.

The COURT.—It shows what they have been doing with the money; I suppose it is offered for that purpose? [513—508]

Mr. WHEELER.—It is offered for another purpose, to show that David Taylor has knowingly received some of the money which Mr. Loring has paid into the corporation under this contract, and I call your Honor's attention to our special plea of estoppel.

(Check No. 1178, to Norcross, Thatcher & Woodburn, dated December 15, 1919, for \$1000, is marked Defendants' Exhibit "A-5" and Receipt Voucher for \$1000 is marked Defendants' Exhibit "A-6.")

Mr. THATCHER.—To this we make the same admission; That they were received, and the endorsements on them are correct; they need not be authenticated.

Mr. WHEELER.—Thank you. We now offer in evidence a check dated Lovelock, Nevada, February 9, 1920, payable to Gibbons, French & Stoddard, for \$6,334.04, which will be marked as our Exhibit "A-7."

(Check No. 3229, dated Feb. 9, 1920, payable to Gibbons, French & Stoddard, is marked Defendants' Exhibit "A-7.")

Mr. WHEELER.—And the endorsements are to be considered as read. The next check which I offer, which will be "A-8," is dated February 7th, 1920, is drawn on the First National Bank of Lovelock by Mr. Friedman, the president, and by the secretary, of the Nevada Humboldt Tungsten Mines Company. Will it be admitted that this is the—

Mr. THATCHER.—We will admit that that is their check.

Mr. WHEELER.—And drawn by the Nevada Humboldt Tungsten Mines Company in payment of the draft which has just been read in evidence?

(Testimony of J. T. Goodin.)

Mr. THATCHER.—Yes.

Mr. WHEELER.—This being dated February 7th; the sequence is that the check is drawn by the company and the draft sent. And we offer the voucher, which will be “A-9.”

(Check of Nevada Humboldt Tungsten Mines Company to First [514—509] National Bank of Lovelock, for \$6334.04, dated Feb. 7, 1920, is marked Defendants’ Exhibit “A-8;” and Receipt Voucher of Norcross, Thatcher & Woodburn for \$6334.04, is marked Defendants’ Exhibit “A-9.”)

Mr. WHEELER.—(Q.) Can you state the respective proportions of the indebtedness, or of the respective amounts of the indebtedness of the different corporations defendant, which were paid out of Mr. Loring’s moneys, which he had paid in on account of the contract already referred to by you?

Mr. THATCHER.—Objected to as irrelevant and immaterial.

The COURT.—Objection overruled.

A. The total indebtedness was in the neighborhood of \$200,000, and it has all been paid.

Mr. WHEELER.—(Q.) Approximately how much of that amount was indebtedness of defendant Nevada Humboldt Tungsten Mines Company?

A. Well, nearly all of it; there was about \$10,000, I believe, outside of that that was of the—I can’t recall that.

The COURT.—Tungsten Products?

A. Yes, sir. Now I am not sure absolutely as to those figures, but that is my best recollection.

(Testimony of J. T. Goodin.)

Mr. WHEELER.—And how much, if any represented the indebtedness or a portion of the indebtedness of the Mill City Development Company?

A. I don't believe that I can answer that and tell you, Mr. Wheeler.

Q. Do you recall whether any part or portion of it represented the indebtedness, or a portion of the indebtedness, of that corporation?

A. Of the Mill City Development Company?

Q. Yes. A. I don't remember.

Q. Have you any memoranda in your special custody or control from which you could ascertain the respective liabilities of those corporations which were paid off with Mr. Loring's money? [515—510]

A. I could get it, and I know approximately the amount of all of them together was \$200,000, but I cannot give them to you separately.

Q. You say you could get it, could you get it at the bank?

A. Yes, I have a list of all those things there.

Q. Perhaps I have a document which will refresh your memory, at least to some extent. I hand you a document dated the 23d day of June, 1919, and ask if that bears your signature?

A. Yes, sir.

Q. I call your attention to the recitals in the document—this, Mr. Thatcher, is his appointment as trustee for the creditors. Examine it and see whether there is anything in that document which will refresh your memory with regard to the

(Testimony of J. T. Goodin.)

amount of indebtedness existing at the time that the document bears date. (Hands to witness.)

A. Well, this would make a hundred and eighty, wouldn't it?

Q. As of that date?

A. Yes, sir, as of that date.

Q. I call your attention to the recital that the Nevada Humboldt Mines Company and the Tungsten Products Company are indebted in various sums, aggregating approximately \$111,493.96?

A. Yes.

Q. And in the sum approximately of \$32,674.88, which accrued since April 30, 1919, which latter amount includes approximately \$5000 for supplies still on hand, and in addition the sum of about \$35,000 due the Wells Fargo Nevada National Bank of San Francisco; is there anything in any of those items that will enable you to segregate the amounts in which the respective corporations defendant were indebted which indebtedness was paid out of the Loring money; if not, and you have memoranda from which you can ascertain that, we will ask you to do it accurately.

A. All of it was paid out of the Loring money with the exception of what was due the Wells Fargo Bank—no, that was paid too; that was paid out of the Loring money too; it was all paid out of the Loring money, as I remember it, because they had no other money to [516—511] pay it out of.

Mr. THATCHER.—(Q.) Do you know that, or is that the way you understand it? A. I know it.

(Testimony of J. T. Goodin.)

Q. Did you handle those accounts? A. Yes, sir.

Q. Did you handle those accounts and make those payments? A. Yes, sir.

Mr. WHEELER.—(Q.) Can you from memorandum that you have at your office or elsewhere, ascertain the respective amounts due the respective companies? A. I can.

Mr. WHEELER.—Will it be satisfactory to counsel if Mr. Goodin sends a written memoranda of that after he returns home?

Mr. THATCHER.—Yes, subject to its relevancy and materiality.

Mr. WHEELER.—The fact will be admitted that the account personally is a full, true and correct statement, but you will not admit its relevancy, competency or materiality in the case, and if admitted, it will be subject to your objection.

Q. How long will it take you to send that to us?

A. I am going home to-night, and I can send it to you to-morrow.

Mr. THATCHER.—I will admit that the papers which counsel holds were executed as shown by the papers themselves, and merely object to them on the ground they are irrelevant and immaterial, and not within the issues of this case, or tending to prove or disprove any defense in behalf of the defendants.

Mr. WHEELER.—The first document we offer is dated June 9th, and purports to be an extension by certain creditors till the 17th day of June, of time within which they will not seek to enforce any of their obligations, being a document which would

carry the obligations to the 17th day of June. We will next offer a document bearing date the 23d day of June, being a trusteeship on the part of Mr. Goodin for the benefit of certain creditors.

The COURT.—To what issue do those documents go? [517—512]

Mr. WHEELER.—The occasion for offering the documents is this, your Honor: One of the objections that is here made to the sufficiency of Mr. Loring's contract and deeds is that there was not sufficient notice of a certain meeting given; and it would appear to us to be the law that even where there are mandatory statutes, directly covering cases of the same character, requiring that there shall be the consent of a certain percentage of stockholders given at a meeting called for a purpose upon a designated notice, that it is held that where there is a necessity for corporate action that such statutes do not apply. In short, we understand it to be the common-law rule, that all or any part of the property of a corporation can be disposed of for the payment of its debts. We argue first, that the Nevada statute that the plaintiff relies upon here was not intended to change the common law; that it was not intended to place an inhibition upon a corporation forbidding it to dispose of its property for the payment of its lawful debts; that it was only intended to meet the situation and requirements of the common law, which would prevent a corporation from transferring all of its assets and its business, without the consent of the stockholders.

(Testimony of J. T. Goodin.)

Mr. THATCHER.—I won't object if that is the purpose of it; we can argue the question of law at the time.

The COURT.—If you want to urge that point, it will go in, and its admissibility will depend on what the law is on that point.

(Appointment of J. T. Goodin as Trustee dated June 23, 1919, is marked Defendants' Exhibit "A-10"; and Agreement in re extension of time, dated June 9th, 1919, is marked Defendants' Exhibit "A-11.")

Mr. WHEELER.—That is all.

Cross-examination.

Mr. THATCHER.—(Q.) Wells Fargo bank account, by what was that paid?

A. By Loring money. [518—513]

Q. Are you sure about that? A. Yes.

Q. When you paid it did you get anything back from Wells Fargo? A. No.

Q. Don't you recollect whether or not the Wells Fargo account was secured by concentrates?

A. It was.

Q. When you paid the account out of the Loring money, did you get the concentrates back?

A. Mr. Loring bought all the assets of the Nevada Humboldt Tungsten Mines Company.

Q. And he took over the equity of the company then in the concentrates?

A. He took everything, and made his payments according to contract, and I paid the debts of the

(Testimony of J. T. Goodin.)

concern out of the money furnished by Mr. Loring.

Q. And he took over the security which had previously been up with the Wells Fargo Bank, the concentrates?

A. Yes, he took the concentrates.

Mr. THATCHER.—That is all.

Redirect Examination.

Mr. WHEELER.—(Q.) You said Mr. Loring bought all of the assets of the Nevada Humboldt Tungsten Mines Company; did he buy everything or were there some exceptions, as noted in the bill of sale?

Mr. THATCHER.—Object to the question as leading.

Mr. WHEELER.—Very well. (Q.) Did he buy everything?

Q. The property of the Nevada Humboldt Mines Company?

Q. I hand you a document, purporting to be a contract between the Nevada Humboldt Tungsten Mines Company and others, to W. J. Loring, dated the 16th day of August, 1919, and ask you if you are familiar with that contract? A. Yes, sir.

Q. And I call your attention to the following portion thereof—

Mr. THATCHER.—Objected to on the ground that the contract speaks for itself; it is already in evidence. [519—514]

The COURT.—I don't see why he can't call his attention to the property that is described in that

(Testimony of J. T. Goodin.)

document, and then ask if there was anything that was not transferred. I suppose that is your idea?

Mr. WHEELER.—That is my idea, your Honor.

The COURT.—Proceed.

Mr. WHEELER.—(Q.) I call your attention to the following portion: “And also, all of the personal property of every kind and description owned by the parties of the first part and each of them, including,” then follows a list of what is included, “in brief, every article of personal property including credits owned by the parties of the first part, or either of them, excepting only their books, corporate seal, and records, and except any item of cash in bank above the amount of \$195.46, and except supplies now at Mill City amounting to \$1106.25, being the following items,” then reciting the items. State whether or not when you said a moment ago that all of the assets were transferred, the transfer did or did not include the items excepted from the contract in the language just read?

Mr. THATCHER.—I object on the ground the question is leading; it seeks to impeach their own witness, and it is testifying from a written instrument which speaks for itself.

The COURT.—The record of course shows what was transferred.

Mr. WHEELER.—The record shows what was transferred; but I think my question was—it was designed if not framed, to meet this situation: Was there any other or different transfer that you

(Testimony of J. T. Goodin.)

had in mind when you said they transferred all of the assets, than this particular transfer?

Mr. THATCHER.—That is all right.

WITNESS.—I will say this; I was busy with other things, and [520—515] this was a side issue, and I remember now; but I don't give to this thing all my time, and things like that naturally had escaped my mind. Of course, I remember now when I see it in the contract here that those things were in.

Mr. WHEELER.—(Q.) So, in other words, the contract was carried out in that respect as drawn?

A. Yes, sir.

Mr. WHEELER.—The witness has referred to this particular document; I think we had better have it in, and marked the next number.

(Contract between the Nevada Humboldt Tungsten Mines Company and Tungsten Products Company and W. J. Loring, dated August 16, 1919, is marked Defendants' Exhibit "A-12.")

Mr. WHEELER.—That is all. Mr. Thatcher, you will admit it is a fact, for us to offer as a fact, that the moneys which appear in the voucher signed by your firm in behalf of David Taylor, were accounted for to David Taylor?

Mr. THATCHER.—Yes, I think the checks show on their face.

Mr. WHEELER.—One does, the other does not.

Mr. THATCHER.—Well, they were.

Mr. WHEELER.—The item of over \$6,000 is the one I am addressing myself to.

(Testimony of L. A. Friedman.)

Mr. THATCHER.—For the purpose of the record, that was sent by us to the New York Trust Company, deposited to the account of David Taylor. [521—516]

Testimony of L. A. Friedman, for Defendants.

L. A. FRIEDMAN, one of the defendants, called as a witness on behalf of the defendants, after being sworn, testified as follows:

Direct Examination by Mr. WHEELER.

Q. Mr. Friedman, what is your occupation?

A. Mining.

Q. Do you hold any relation to any banking institution? A. Not at the present time.

Q. Where do you reside?

A. Lovelock, Nevada.

Q. You are one of the defendants in this action?

A. I am.

Q. Were you also a defendant in an action brought by David Taylor for the recovery of \$9,000, or thereabouts, an action subsequently settled by the payment of money? A. I was.

Mr. WHEELER.—I am not sure I have asked you in accordance with the fact; let me have the action, if you please, I think it is here in evidence; a suit to recover \$9,000.

Mr. THATCHER.— I will admit the suit was filed, Mr. Wheeler, and that the record may be used and referred to.

Mr. WHEELER.—(Q.) At any rate, you are

(Testimony of L. A. Friedman.)

familiar with the fact that the suit was brought by David Taylor to recover from the Nevada Humboldt Tungsten Mines Company the sum of \$9,000, or thereabouts, are you?

A. Yes, sir, I was served with summons.

Q. Are you familiar with the fact that suit was settled? A. Yes.

Q. Did you have anything to do with the arranging for the payment of money in that suit, in settlement of that suit?

A. I arranged for the settlement.

Q. Did you in the course of that litigation have any conversation with Mr. Thatcher, one of the attorneys for David Taylor in that action? [522—517]

Mr. THATCHER.—Object on the ground it is incompetent, irrelevant and immaterial to the present issue. Any conversation that he had with me was merged into the actual settlement itself, and it is nothing more or less than a preliminary negotiation.

Mr. WHEELER.—This is a preliminary question.

The COURT.—Well, he may answer that.

A. Yes.

Mr. WHEELER.—(Q.) Was anything said in the course of that conversation with reference to the source from which you would obtain the moneys with which to pay the claim? A. Yes.

Q. What was said between you and Mr. Thatcher upon that subject?

Mr. THATCHER.—I object on the ground it is incompetent, irrelevant and immaterial, not within any of the issues in this case, and being nothing more nor less than a negotiation which led up to the settlement itself, and merged in the settlement, and not binding upon the plaintiff David Taylor.

The COURT.—How about negotiations for a settlement?

Mr. WHEELER.—It was not negotiation for a settlement at all. It is simply for the purpose of showing counsel will admit it—he knew directly while he was acting in this matter for David Taylor that the source of the money, or a portion of it at least, was to be from funds received from Mr. Loring.

Mr. THATCHER.—I don't want to go on the witness-stand and dispute Mr. Friedman's statement, but Mr. Friedman is mistaken.

Mr. WHEELER.—Counsel does not yet know what Mr. Friedman is going to testify to, so I can hardly see why it is necessary to announce in the presence of this witness that he disputes it; we think it will not be disputed after Mr. Friedman testifies; if counsel does not recall it already, he will recall it then.

The COURT.—Well, I will admit it, but it will go in subject to [523—518] a motion to strike.

WITNESS.—When I made that settlement, or arranged for it, I went to Reno to see Mr. Gibbons, who was at that time our attorney, of Gibbons, French & Stoddard; and I told him what terms we could set-

(Testimony of L. A. Friedman.)

tle on, which was that we would pay one thousand dollars, which amount we still had in our treasury from the previous payment that had been made.

Mr. WHEELER.—(Q.) By whom?

A. By Mr. Loring.

The COURT.—Is this responsive to any question?

Mr. WHEELER.—I think this may all go out. Read the question please.

(The reporter reads the question; What was said between you and Mr. Thatcher upon that subject?)

A. When I left Mr. Gibbons' office about 4 o'clock in the afternoon, I was told that Mr. Gibbons had taken sick and gone home; I was to see him, so I started towards the hotel and I met Mr. Thatcher on the street close to the Reno National Bank; I asked him if he had seen Mr. Gibbons at noon, and he said, "yes"; "Well," I said, "is that agreeable, the arrangement that we had made to pay a thousand dollars now, and the balance when we get the money, on the first payment that we can spare the money"; and he said, "Well, I think if that is the best that can be done that that will be agreeable to my client but I will have to take it up with him first"; "Well," I said, "that is the very best we can do, because we haven't got the money until we get that payment, and if we can't do that, we will have to let it go, even though we have to let them take judgment by default"; "But," I said, "if you are afraid of the payment being made, Mr. Goodin and I will personally sign a stipulation that we will guarantee the payment of it"; "Oh," he said,

(Testimony of L. A. Friedman.)

“that is all right, anything that Mr. Goodin signs goes with me.”

Q. You say until the second payment or other payment was made, [524—519] what payment did you refer to, in your conversation with Mr. Thatcher?

Mr. THATCHER.—Objected to as calling for the conclusion of the witness.

The COURT.—He can repeat what was said. I will sustain the objection.

Mr. WHEELER.—(Q.) Repeat again, please, what was said on that occasion by you to Mr. Taylor, with regard to the matter of payment.

A. Well, I told him that unless we could make that kind of a settlement, that we would have to let it go, even though they would take judgment by default, as we did not have the money until the next payment was made, which was the Loring payment.

Q. Did you say anything about its being the Loring payment?

A. Yes, I was talking about the Loring payment.

Mr. THATCHER.—I object, if the Court please.

Mr. WHEELER.—(Q.) Did you use the words—

Mr. THATCHER.—(Intg.) Object on the ground it is incompetent, irrelevant and immaterial; the question is leading; the witness has related the conversation.

The COURT.—I will sustain the objection.

(Testimony of L. A. Friedman.)

Mr. WHEELER.—(Q.) Was anything said in the course of that conversation as to who the payment was to come from that was to be used for the making of the payment referred to by you? A. Yes.

Q. What was said?

A. Well, I stated that we would not have the money until Mr. Loring made his next payment.

Q. Did you use Mr. Loring's name in the course of that conversation with Mr. Thatcher?

A. I did, several times.

Mr. THATCHER.—Objected to as leading; the witness can tell what the conversation was. I move to strike out the testimony.

Mr. WHEELER.—I submit the witness' statement does not purport [525—520] to be a verbatim report of his conversation; he has said when we got the next payment, now I am trying to find out what was said, if anything, as to the source from which the payment was to come.

The COURT.—He has been cautioned two or three times to repeat that conversation, and it seems to me when that particular thing was the gist of what you wanted to bring out, the witness ought to be able to tell that without being led; but I will let you go on and ask the question.

(The reporter reads the question.)

A. Yes.

Mr. WHEELER.—That is all.

(Testimony of L. A. Friedman.)

Cross-examination.

Mr. THATCHER.—(Q.) Where did this take place, Mr. Friedman, this conversation?

A. Right on the street, between the Reno National Bank and the drug store.

Q. And in that conversation you stated to me that you could pay a thousand dollars down and the balance when the Loring payment on the contract, the next Loring payment, was made; is that right?

A. No, I told you that it would be the second payment that was going to be made, because the next payment had to go to the creditors, under our agreement.

Q. You put that in, too, did you, you said the next payment had to go to the creditors?

A. Yes, I did.

Q. What date was that?

A. That was some time between the 1st and 10th of December, 1919.

Q. The first and 10th of December?

A. Yes, I can't just recall the exact day and date.

The COURT.—What year did you say that was?

A. 1919, between the 1st and the 10th of December.

Mr. THATCHER.—(Q.) And that took place in Reno, Nevada. A. Yes.

Q. Between the 1st and 10th of December, 1919?

A. Yes.

Mr. THATCHER.—That is all.

Mr. WHEELER.—That is all, Mr. Friedman.

**Testimony of C. W. Poole, for Defendants
(Recalled.)**

Mr. C. W. POOLE, recalled by defendants, testified as follows:

Mr. WHEELER.—(Q.) Mr. Poole, you made some mention on your cross-examination of some employment or expected employment by the plaintiff Taylor, or the corporation which he was to organize, or some corporation with reference to the mines of the defendant, Nevada Humboldt Tungsten Mines Company; state fully, please, just what was said between you and Mr. Taylor, or between you and any other person in Mr. Taylor's presence upon that subject.

Mr. THATCHER.—I object upon the ground it is indefinite as to date, and that it has already been asked and answered.

Mr. WHEELER.—It has not been asked by me, your Honor, and the matter was brought up for the first time on cross-examination.

The COURT.—You may ask. What was the date and the place?

Mr. WHEELER.—(Q.) What was the date that it took place, the conversation, and any subsequent conversation; if there was more than one conversation, give them all to us, stating when and where the conversation occurred.

A. It occurred the day we signed our first contract with Mr. Taylor in San Francisco, and was in Mr. Thane's office there. After we had signed the

contract, Mr. Thane called me into his private office, and he and I were in there alone for some time; then Mr. Taylor and Mr. Bancroft came in to sign some papers, and as they were signing the papers, Mr. Thane told me the nature of the document they were signing; it was a contract amongst themselves with reference to their deal with us; and Mr. Thane said, "Well, Poole, I am glad the whole matter is over; how do you feel about it"?

The COURT.—Was this a matter that was brought out on cross-examination?

Mr. WHEELER.—It was brought out on cross-examination, your [527—522] Honor.

The COURT.—This conversation?

Mr. WHEELER.—No, not this conversation, but the subject of employment.

The COURT.—I remember there was some testimony about that, but I understood that occurred at the Denver meeting, when he was told that his conduct, or the truth of his statements rather, would have a very serious bearing on his future. I don't remember any examination with reference to a conversation that occurred in San Francisco.

Mr. WHEELER.—There was none, your Honor.

The COURT.—Well, do you think this is redirect examination?

Mr. WHEELER.—I think it is, your Honor. The purpose of it I think perhaps is not obvious to your Honor. My recollection of the record, I have not been fortunate enough to lay my hand on the precise question and answer, but my recollection of

the record is that it might leave room for the argument or the inference that relations of a fiduciary character existed between this witness and Mr. Taylor, and it was for that reason I purposed going into the question as to just what had been said with regard to employment by him in order that the record may be clear upon that point.

(Discussion.)

The COURT.—I haven't the slightest idea that I will consider that testimony when I write an opinion, if I take the time and labor to write out an opinion and dispose of every question in the case, but it may go in, subject to a motion to strike, and if I do consider it at all, it will be in such a way that Mr. Taylor will have the benefit of it; but it does seem to me that the examination should be confined to the matter that was brought out originally.

Mr. WHEELER.—I think your Honor will agree with me that it [528—523] would hardly be fair to have the record left in a shape where the argument could be made or an inference drawn that relations of a fiduciary character existed.

The COURT.—I have not the least idea there were any fiduciary relations existing.

Mr. THATCHER.—Neither have I, your Honor.

Mr. WHEELER.—That is all, Mr. Poole. I accept counsel's statement. [529—524]

Mr. WHEELER.—Mr. Thatcher, I have here what purports to be minutes of the Board of Directors' special meeting of the Tungsten Products Company.

Mr. THATCHER.—Have you or Mr. Davis compared them?

Mr. WHEELER.—I have not; but subject to the same opportunity on your part taken on the minutes offered by you, I will offer them. These are of date of August 16th, 1919. Let them be marked our next exhibit, please.

(Minutes of special meeting of Board of Directors of Tungsten Products Company, dated August 16, 1919, marked Defendants' Exhibit "A-13.")

Mr. WHEELER.—We offer the minutes of the special meeting of the stockholders of the Tungsten Products Company, of August 16, 1919, and ask that they be marked our next exhibit.

(Minutes of special meeting of the stockholders of Tungsten Products Company, dated August 16, 1919, marked Defendants' Exhibit "A-14.")

Mr. WHEELER.—There will be the same stipulation with regard to the minutes of the meeting of the Directors of the Tungsten Products Company, held on the 23d day of August, 1919?

Mr. THATCHER.—That is all right.

Mr. WHEELER.—And we offer it as our next exhibit.

(Minutes of special meeting of Board of Directors of Tungsten Products Company, dated August 23, 1919, Marked Defendants' Exhibit "A-15.")

Mr. WHEELER.—The same stipulation with regard to a meeting of the directors of the Nevada Humboldt Tungsten Mines Company, held on the 23d day of August, 1919.

(Minutes of special meeting of Board of Directors of Nevada Humboldt Tungsten Mines Company, dated August 23, 1919, marked [530—525] Defendants' Exhibit "A-16.")

Mr. WHEELER.—The same stipulation with regard to the minutes of a special meeting of the stockholders of the Nevada Humboldt Tungsten Mines Company, held on the 23d day of August, 1919.

(Minutes of special meeting of stockholders of Nevada Humboldt Tungsten Mines Company, dated August 23, 1919, marked Defendants' Exhibit "A-17.")

Mr. WHEELER.—Minutes of a meeting of the Board of Directors of the Nevada Humboldt Tungsten Mines Company, held on August 23, 1919, same stipulation with reference to it.

(Minutes of meeting of Board of Directors of Nevada Humboldt Tungsten Mines Company, dated August 23, 1919, marked Defendants' Exhibit "A-18.")

Mr. WHEELER.—Same stipulation with reference to the minutes of special meeting of the stockholders of the Nevada Humboldt Tungsten Mines Company, held on the 19th day of April, 1920.

(Minutes of Special Meeting of Stockholders of Nevada Humboldt Tungsten Mines Company, dated April 19, 1920, marked Defendants' Exhibit "A-19.")

Mr. THATCHER.—Are the notices of those meetings in also?

Mr. WHEELER.—No notices are attached thereto. On some of those other documents I have just offered, there is an order of the Board of Directors or stockholders, calling meetings. This document seems to be already in, but your attention, Mr. Thatcher, was not called to the fact that ratifications were attached to the documents shown to Mr. Goodin. The due execution of the instrument is admitted, I take it?

Mr. THATCHER.—Yes.

Mr. WHEELER.—There will be no dispute, I take it, as to the issued number of shares of stock of the Nevada Humboldt Tungsten Mines Company; that is one million shares of the par value of one [531—526] dollar each?

Mr. THATCHER.—That is correct.

Mr. WHEELER.—And the issued shares of the Tungsten Products Company was what, Judge Davis?

Mr. DAVIS.—One hundred thousand, less 320.

Mr. WHEELER.—One hundred thousand, less 320. That is your understanding, Mr. Thatcher, and I ask you to admit it.

Mr. THATCHER.—I think that is correct; it can stand as being correct.

The COURT.—Is all the stock of the Tungsten Company issued?

Mr. WHEELER.—All of the stock of the Nevada Tungsten Mines Company is issued; not all of the stock of the Tungsten Products Company,

the latter being a corporation of 100,000 shares, and 320 shares are not issued.

Mr. THATCHER.—Well, the stock of that company was all owned except the qualifying shares, by the Nevada Humboldt Company.

Mr. WHEELER.—That is something that I cannot tell you about; I can tell you that the stock stood in various names in accordance with the ratification.

Mr. COOKE.—Mr. Friedman, trustee, has 94,680 shares.

Mr. WHEELER.—There seem to be the following stockholders: L. A. Friedman, 1,000 shares; I am told by Judge Davis, that is a mistake upon the document here, it reading 1060 shares; it should be 1,000.

Mr. THATCHER.—My record shows; Friedman, 1,000; Nenzel, 1,000; Jones, 1,000; Huntington, 1,000, and L. A. Friedman, trustee, 94,680.

Mr. WHEELER.—So you will agree with Judge Davis that the number in Mr. Friedman's name is 1,000, and not 1060, as appears in this ratification? I am referring to the ratification annexed to Defendants' Exhibit "A-12." [532—527]

Mr. THATCHER.—Well, can't it be admitted that all of this stock in fact was owned by the Nevada Humboldt Tungsten Mines Company?

Mr. WHEELER.—That I am not prepared to admit; I have not asked the specific question; if it is the fact I will be very glad to admit it. We next

offer in evidence document entitled "Mining Deed," dated August 23, 1919, between Nevada Humboldt Tungsten Mines Company, party of the first part, and W. J. Loring, party of the second part.

(Mining Deed, dated August 23d, 1919, is marked Defendants' Exhibit "A-20.")

Mr. WHEELER.—The next is a deed dated the 23d day of August, 1919, between the Tungsten Products Company and W. J. Loring.

(Deed between Tungsten Products Co. and W. J. Loring, dated August 23, 1919, is marked Defendants' Exhibit "A-21.")

Mr. THATCHER.—Is not that admitted, Mr. Wheeler?

Mr. WHEELER.—I am not certain it is admitted. You claim certain instruments were executed, and you question their validity; I think the form of each of the documents should be here in order to show just what property was conveyed; and also to show that valid instruments were executed and delivered.

The next is a deed dated August 23, 1919, between Nevada Humboldt Tungsten Mines Company, and W. J. Loring.

(Deed from Nevada Humboldt Tungsten Mines Co. to W. J. Loring, dated August 23, 1919, is marked Defendants' Exhibit "A-22.")

Mr. WHEELER.—The next is an assignment, dated the 23d day of August, 1919, from Nevada Humboldt Tungsten Mines Company to W. J. Loring.

(Assignment from Nevada Humboldt Tungsten Mines Co. and Tungsten Products Co. to W. J. Loring, dated August 23, 1919, marked Defendants' Exhibit "A-23.") [533—528]

Mr. WHEELER.—The next is a Bill of Sale, dated the 23d day of August, from the Nevada Humboldt Tungsten Mines Company to W. J. Loring.

(Bill of Sale, Nevada Humboldt Tungsten Mines Co. to W. J. Loring, dated August 23, 1919, is marked Defendants' Exhibit "A-24.")

Mr. WHEELER.—The next is a mortgage to secure purchase price, dated August 23, 1919, executed by W. J. Loring, the mortgagor, to the Nevada Humboldt Tungsten Mines Company and the Nevada Tungsten Products Company, mortgagees.

(Mortgage to Secure Price, dated August 23, 1919, is marked Defendants' Exhibit "A-25.")

(A short recess is taken at this time.)

Mr. WHEELER.—We also offer in evidence the Book of By-laws of the Nevada Humboldt Tungsten Mines Company. Is there any objection to that, Mr. Thatcher?

Mr. THATCHER.—No.

(Book of By-laws of Nevada Humboldt Tungsten Mines Co. is marked Defendants' Exhibit "A-26.")

Mr. WHEELER.—I think the pleadings in case B-1 have not been offered formally. That is the suit brought by Mr. Taylor to set aside the transaction, suit brought October 27, 1919. I would like the complaint and the pleadings therein deemed

(Testimony of W. J. Loring.)

read. Mr. Loring is a party to that suit, your Honor.

Mr. THATCHER.—No objection.

Mr. WHEELER.—I do not recall that the affidavit of Mr. Taylor that was used upon the order to show cause has been formally offered. That was the affidavit in which he verifies the complaint in this action. I would like to have that considered as read.

Mr. THATCHER.—Well, I object to that on the ground it is incompetent, irrelevant and immaterial. Mr. Taylor is here, and testified; it is nothing more nor less than a verification at the most.

Mr. WHEELER.—A declaration, we claim, against interest.

The COURT.—It may be admitted. [534—529]

Testimony of W. J. Loring, for Defendants.

Mr. W. J. LORING, one of the defendants, called as a witness on behalf of the defendants, after being sworn, testified as follows:

Direct Examination by Mr. WHEELER.

Q. Mr. Loring, you are one of the defendants in this action? A. I am.

Q. Were you present in court when Plaintiff's Exhibit 28, purporting to be a telegram from David Taylor to you, was placed in evidence? A. I was.

Q. Are you familiar with the contents of that telegram? A. I am.

Q. I hand you Plaintiff's Exhibit 29, and ask you

(Testimony of W. J. Loring.)

if you recall sending that telegram in answer to Plaintiff's Exhibit 28?

A. Yes, I know that telegram.

Q. I call your attention to the words of your telegram: "I hold option on Nevada Humboldt interests." Examine the document which I now place in your hands, dated July the 21st, with the signature W. J. L. appearing there; I ask you whether or not that is a letter-press copy of a letter addressed by you to L. A. Friedman, President Nevada Humboldt Tungsten Mines Company, on the 21st day of July, 1919? A. It is.

Q. W. J. L. being your initials? A. Yes, sir.

Q. And the original was signed by you, was it?

A. Yes, it was.

Q. I call your attention to a document dated July 21, 1919, bearing several signatures, and ask if that was received by you in reply to the document which you have just identified, which document is dated July 21, 1919? A. Yes, it was received by me.

Q. State whether or not this is one of the documents referred to by you as constituting an option on Nevada Humboldt interest referred [535—530] to in your telegram, Plaintiff's Exhibit 29?

A. It is.

Mr. WHEELER.—We offer it in evidence.

Mr. THATCHER.—I object to it on the ground the document does not constitute any option or contract made by the Nevada Humboldt Tungsten Mines Company under its seal or by its authority; and it is not shown to be made by the authority of

its stockholders or directors, or any managing board of said corporation.

Mr. WHEELER.—Do you claim that it was not made by the authority of such board of directors?

Mr. THATCHER.—It does not show.

Mr. WHEELER.—I know, but do you dispute the fact; perhaps we can have an admission.

Mr. THATCHER.—No, I don't know; I am frank to say I don't know; that is a matter for you to prove.

Mr. WHEELER.—We do not offer it as constituting an option in law; I offer it as constituting one of the documents referred to by the witness in his telegram; whether it is in law an option, is a different question.

Mr. THATCHER.—I don't object if offered for that purpose, as being a document or documents to which he referred in his telegram.

Mr. WHEELER.—That is very satisfactory to me; in fact, I will admit it was never formally executed by the corporation, or ever authorized by the corporation: (Reads:)

“Lovelock, Nevada, July 21st, 1919. L. A. Friedman, President Nevada Humboldt Tungsten Mines Company, and Tungsten Products Company, Lovelock, Nevada. Dear Sirs: I beg to confirm my conversation with you this morning with reference to an option that I wish to secure from you and your associates upon the property of [536—531] the Nevada Humboldt Tungsten Mines Company, Tungsten Products Company and also the interest of the

Mill City Development Company, which I understand to be as follows:

“I understand that the total indebtedness of the company, at the present time, is about \$200,000, and it is my understanding that the first payments made are to be for the purpose of liquidating the indebtedness referred to, and should it be found that a larger sum than \$200,000 will be necessary to liquidate the indebtedness of the company, that the same shall be taken from the payments that will follow after \$200,000 has been received by yourselves. These payments are to be made on the following dates, for the following amounts, namely: 4th of August, 1919, \$50,000—and so on with various dates, making a total of \$333,333.33—

“It is understood by me that any money that may be received from the government, as relief under the War Minerals Relief Bill, shall be for the benefit of the purchasers of your company and its rights, and that all concentrates on hand, or in transit, and all monies owing to the company at the time of making the first payment shall belong to the purchasers. Also, whatever amount is secured from the government as relief under the War Minerals Relief Bill it is understood shall be applied immediately to the liquidation of indebtedness; the payment of indebtedness next coming due in accordance with the terms of this agreement.

“It is also understood that no part of the agreement is to be considered an option except that part from the date hereof until the 4th of August, 1919, during which time I am to make such preliminary

(Testimony of W. J. Loring.)

arrangements as I may see fit for further carrying into effect the terms of this agreement, or abandoning the same. I might state here, that I may find that two weeks will be inadequate for me to make the necessary financial arrangements for carrying this agreement into effect, and should I find it necessary to ask for an extended few days, I dare say that that time will be granted me, providing that I show good faith in my actions from this occasion to the end of the two weeks period referred to.

“It is understood that should at the end of the two weeks period referred to that this agreement is to be put into effect, that it will be confirmed by properly drawn up legal document.

“With kindest regards, I remain, Faithfully yours, W. J. L.”

Annexed to this is a document signed by individuals:

“The price terms and conditions, as outlined in your letter, are satisfactory to us and we hereby grant you this option.” Signed by L. A. Friedman, C. W. Poole, C. W. Jones, G. H. Hinch, R. Nenzel and Lena J. Friedman.

Q. I hand you a document dated the 9th day of August, 1919—this your Honor will observe is July 21st—and ask you to examine the [537—532] same and state whether or not that is a letter-press copy of a document signed by you, and sent to the person to whom it is addressed?

A. Yes, this is a carbon copy of the letter.

Q. Sent at that date? A. Sent at that date.

(Testimony of W. J. Loring.)

Q. And is the other document, dated August 9th, signed by L. A. Friedman and others, the reply thereto? A. It is.

Q. And was that reply given to you at that date?

A. It was.

Mr. THATCHER.—This is for the purpose of showing his relation to them at the time of the Taylor telegrams and correspondence?

Mr. WHEELER.—It is offered as the option referred to in the telegram dated August 12th, being a part of the documents referred to by the witness when he says, “I hold option on Nevada Humboldt interest.”

Mr. THATCHER.—I object to it on the ground it is nothing more or less than negotiations which led up to the execution of the contract itself, between the corporation and Mr. Loring; and that it is purely self-serving declarations as between the parties, and does not in any way bind the plaintiff in this action; that it is not an option or a contract in its present, or any other form.

The COURT.—It seems to me the only effective use of this testimony is to explain why this option was not dated, or was not really executed until after these telegrams, and that the negotiations were in progress before the telegrams were received. I think I will sustain the objection on the ground it is not necessary. It seems to me that is explained already without putting in anything further; I think you have established that fully, and explained

(Testimony of W. J. Loring.)

it. If it becomes a point that is disputed, I shall consider it later, but I don't suppose it will be.

Mr. WHEELER.—Let this be offered and marked as our exhibit. [538—533]

(Letter to L. A. Friedman, signed W. J. L., dated July 21st, and reply, marked Defendants' Exhibit "A-27.")

Mr. WHEELER.—The point is to rebut any inference that this witness had entered into this contract before he had before him David Taylor's attitude with regard to bringing suit, either for specific performance or for damages.

The COURT.—I don't see but what you have fully established that, unless it is disputed.

Mr. WHEELER.—Our proposition is this: Witness did not enter into this contract, dated August 16th, 1919, already offered here in evidence, for the purchase of these properties of the defendant corporations, and of one-half of the stock of one of the defendant corporations, until the suit 2263 had been filed in this court, and until knowledge of that suit had been brought home to this witness, and he was aware of the fact.

Mr. THATCHER.—I am not willing to admit that, to make an admission of that kind.

The COURT.—Go on and put the testimony in then.

Mr. WHEELER.—We offer them the letter of August 9th.

The COURT.—The testimony will go in, of course, subject to your objection.

Mr. THATCHER.—I object on the ground they are incompetent, irrelevant and immaterial, and merely negotiations which occurred between the parties prior to the execution of the contract, and that they are not in form or substance or in fact or in law options or contracts entered into by Mr. Loring, which in any way bound him at any time prior to the time that he had knowledge of any action or intention of acting, of Mr. Taylor's.

Mr. WHEELER.—In that objection there is coupled an admission that there was nothing that bound the defendant Loring in any manner [539—534] nor until after Mr. Taylor had brought his suit.

Mr. THATCHER.—If there is coupled any such admission I would like to withdraw it, because I make no such admission.

Mr. WHEELER.—I think if it is read you will find that is the effect of it.

The COURT.—Well, the objection is overruled, and you are offering it for no other purpose than that; you are not offering it as preliminary negotiations?

Mr. WHEELER.—Not at all.

The COURT.—And it is not admitted for that.

Mr. WHEELER.—I am willing that it be confined to other purposes than that stated by counsel.

The COURT.—I will state, General Thatcher, I think your objections are good, and that the testimony cannot be considered for the matters that you are objecting to.

Mr. WHEELER.—I also agree with counsel on

(Testimony of W. J. Loring.)

that, your Honor. I will state briefly that the document dated August 9th refers to the letter of the 9th of August annexed thereto, and that it modifies in some respects the proposed terms of the purchase of the properties in question, and shows that the matter was still in process of negotiation on the 9th day of August, 1919, and that nothing had on that date been concluded.

(Letter to L. A. Friedman signed W. J. L., dated August 9th, 1919, and reply thereto are marked Defendants' Exhibit "A-28.")

Mr. WHEELER.—(Q.) Mr. Loring, you are acquainted with Mr. Booth B. Goodman of Lovelock, Nevada? A. I am.

Q. Did you at any time before the signing of the document, the contract entered into between you and the defendant corporations here in evidence, learn, or know, or receive information to the effect that a suit had been filed by Mr. Taylor against L. A. [540—535] Friedman and others, for damages? A. I did.

Mr. THATCHER.—Now, Mr. Wheeler, subject to my objection that all this testimony is incompetent, irrelevant and immaterial, I am willing to admit these telegrams were sent to Mr. Goodman, and that he responded on the dates there shown, and that he made the investigation as Mr. Loring's attorney, under the direction I think of Mr. Davis, is that right?

Mr. WHEELER.—No, under the direction of both Mr. Loring and Mr. Davis.

Mr. THATCHER.—Well, I will make it that way; and object to the testimony as incompetent, irrelevant and immaterial to any of the issues in this case, not constituting a defense.

Mr. WHEELER.—Coupled with that also, and to save me further investigation along this line, will you admit that there first came a telegram from Mr. Goodman to Mr. Loring, advising Mr. Loring that the suit in question had been brought?

Mr. THATCHER.—Have you the telegram?

Mr. WHEELER.—I haven't it here. I can ask for it. Find it for me, Mr. Davis.

Mr. THATCHER.—I will admit those were sent.

Mr. WHEELER.—That those two were sent; and that he had previously heard that the suit had been brought, but did not know its nature.

Mr. THATCHER.—Yes, I will admit that.

Mr. WHEELER.—It is admitted that previous to the sending of this wire dated August 19th, the defendant Loring had learned that a suit had been brought by Mr. Taylor, but did not know its nature, and that thereafter upon request from Mr. Goodman for further information, the wire dated August 19th, about to be offered in evidence, was received by Mr. Loring; that thereafter upon a request from Judge [541—536] John F. Davis, an attorney for Mr. Loring, for further information, the telegram dated August 19th was sent, and that the telegram itself was exhibited to Mr. Loring.

Mr. THATCHER.—I will admit that.

Mr. WHEELER.—We offer them in evidence.

(Telegram dated August 19, 1919, to W. J. Loring from Booth B. Goodman, is marked Defendants' Exhibit "A-29," and the telegram dated August 19, 1919, from Booth B. Goodman to Judge John F. Davis, is marked Defendants' Exhibit "A-30," and are read by counsel for defendant as follows:

"Lovelock, Nevada, Aug. 19th, 1919.

"W. J. Loring,

614 Crocker Bldg.,

San Francisco, Calif.

"Have personally inspected all papers served in Friedman cases stop one case is against the individuals on alleged misrepresentations and does not in any way effect us stop the second is against the tungsten mine and mill corporations for nine thousand dollars stop writ of attachment issued against company properties in second suit but Friedman and associates are furnishing bond which will prevent service of writ stop the suits in their present status will not in any way interfere with our deal stop will keep you advised of any new development stop am mailing copies of papers to Judge Davis.
BOOTH B. GOODMAN."

Mr. WHEELER.—The telegram addressed to Judge Davis by Mr. Goodman is as follows:
(Reads.)

"Replying your wire Taylor suits pray for straight money judgment only stop suit against companies demands nine thousand as balance for money loaned to the corporations and which was secured by hundred tons of concentrates stop plain-

(Testimony of W. J. Loring.)

tiff alleges that security was insufficient and balance is due stop other suit in [542—537] against Friedman and associates as individuals based on allegation that upon representations by defendants plaintiff rendered services and expended money in an effort to raise money for the corporations in consideration for which he has to receive sixty-two per cent of capital stock stop that said representations were false in regard to developed tonnage stop allege damages caused by reason of said alleged misrepresentations which made it impossible to carry out contract after discovery thereof see wires to Loring.

BOOTH B. GOODMAN.”

Mr. WHEELER.—(Q.) Mr. Loring, was the contract dated the 16th day of August entered into by you on that day? A. Yes.

Mr. THATCHER.—I suppose he means that he signed it on that day?

Mr. WHEELER.—You mean you signed it on that day? A. I did.

Q. Was that before or after there had come to your knowledge the contents of the two telegrams just offered in evidence? A. Afterwards.

Q. Was it before or after you had received and knew the contents of Mr. Taylor's telegram to you, offered in evidence, in which he makes mention of a possible suit for specific performance, or as an alternative, a suit for damages? A. After.

Q. Did you pay any money on account of this

(Testimony of W. J. Loring.)

transaction to any person, persons or corporation at any time prior to the first day of September, 1919?

A. I did.

Q. I mean any payment on account of the purchase price of the properties; if so what was it and on what day?

A. I made an advance prior to the first day of September, 1919.

Q. On what day did you make the advance, do you remember? A. I don't remember.

Q. That was an advance against concentrates, was it not? [543—538]

A. No, it was not; it was an advance to liquidate certain debts that Mr. Friedman informed me were very pressing, and in place of waiting till the first of September, I advanced seventeen thousand odd dollars prior to that date.

The COURT.—(Q.) \$17,000 prior to the first day of September? A. Yes, your Honor.

Mr. WHEELER.—(Q.) And in addition to that \$17,000, how much did you pay on the first day of September?

A. The balance of \$50,000, making the total \$50,000.

Q. And those two payments make up the first payment under the contract in question?

A. They do.

Q. Did the plaintiff Taylor, or any person representing him, ever tell you at any time prior to the making of any of the said payments, at any time subsequent to the telegram from Taylor to you,

(Testimony of W. J. Loring.)

dated August 10, 1919, that he intended to or contemplated, or would bring any suit for specific performance? A. He did not.

Q. I think I asked this question in substance, but I am not sure, so I will repeat it for the sake of the record, in any event. Did you pay any part of the said \$50,000 at any time prior to the 19th day of August, 1919?

A. I don't remember. Myself and a partner in some of my affairs had loaned Mr. Friedman's company \$10,000, and that ten thousand loans was secured by thirty tons of concentrates, and that money was used for the purpose of paying off the labor on the mine.

Q. That was ten thousand dollars?

A. Ten thousand dollars of the seventeen thousand referred to a while ago.

Mr. THATCHER.—(Q.) A part of the seventeen thousand?

A. A part of the seventeen thousand.

Mr. WHEELER.—(Q.) When was the remaining seven thousand dollars furnished, or was the seventeen thousand in addition? [544—539]

A. No, the ten thousand dollars is a part of the seventeen thousand the seventeen thousand was advanced, and that paid me back my loan.

Q. Of ten thousand dollars?

A. Yes, of ten thousand dollars.

Q. What form did that transaction take; was it a loan, a purchase by you of claims, or what was it?

(Testimony of W. J. Loring.)

A. That was a loan.

Q. To whom did you loan the money?

A. I loaned it to the Nevada Tungsten Mines Company.

Q. Did you take any obligation for it?

A. They delivered to me thirty tons of concentrates.

Q. I mean out of the seventeen thousand dollars?

A. I don't understand the question.

Q. As I understand you, you first loaned ten thousand dollars, and received as security thirty tons of concentrates? A. That is right.

Q. That later on seventeen thousand dollars was advanced by somebody, and you got back your ten thousand dollars, is that right?

A. That is right; I advanced the seventeen thousand.

Q. How was the seventeen thousand dollars advanced, to whom was it paid?

A. That was paid on account of the purchase of this property.

Q. And when was it paid, according to your best recollection?

A. I don't remember that date, but the record shows.

Q. Was it before or after the contract of the 16th was signed?

A. Oh, it was after the contract was signed.

Q. Was it before or after the receipt by you of the telegram from Mr. Goodman? A. After.

Q. And it then went in to make up a part of the

(Testimony of W. J. Loring.)

first payment, and was so considered when the payment of the first of September came due, and was finally liquidated, is that right? [545—540]

A. That is right.

Mr. WHEELER.—You may take the witness.

Cross-examination.

Mr. THATCHER.—(Q.) Will you tell me the date on which you made the loan of ten thousand dollars on concentrates? A. I cannot.

Q. Have you your books here that would show that, Mr. Loring?

A. I suppose we have records here that will show it, I am not certain.

Q. Will you at the noon recess look up your records and ascertain for me the date when you advanced the ten thousand dollars?

A. I can get it for you, if not here, in San Francisco.

Q. Was a note given to you for that, a corporation note? A. I am not certain.

Mr. THATCHER.—Will counsel inform me whether or not a note was given, and if there was, will they produce it.

Mr. WHEELER.—I know there was a company transaction, what form it took I do not know.

Mr. THATCHER.—Will you also get for me the exact time of the payment of the seventeen thousand dollars?

WITNESS.—I will.

Q. Did you meet Mr. Taylor and take breakfast

(Testimony of W. J. Loring.)

with him in the Belmont Hotel in New York, about June 25th?

Mr. WHEELER.—It is not cross-examination, but I do not object to it upon that ground, your Honor.

The COURT.—Well, proceed then.

A. Mr. Taylor had breakfast with me at the Belmont Hotel.

Mr. THATCHER.—(Q.) I mean did you and Mr. Taylor take breakfast together at the Belmont Hotel? A. We did.

Q. About what date was that? [546—541]

A. Sometime after the middle of June, I should say.

Q. Would you say the 20th or 25th of June?

A. Perhaps at that time, I could not say.

Q. Did you at that time discuss with Mr. Taylor the Nevada Humboldt Tungsten Mines Company property? A. Casually, yes.

Q. Did he at that time tell you he was going to bring an action against the Nevada Humboldt, or its stockholders? A. He did not.

Q. Did he not at that time inform you he was about to bring an action against the Nevada Humboldt and the defendants Friedman, Poole, Murrish and others here defendants, and did you not at that time say that you would keep your hands off of the Nevada Humboldt? A. I did not?

Q. You didn't have that conversation in substance and effect?

A. Not anything pertaining to it.

(Testimony of W. J. Loring.)

Mr. THATCHER.—That is all.

Redirect Examination.

Mr. WHEELER.—(Q.) Was anything said on that occasion by Mr. Taylor with regard to the Nevada Humboldt Tungsten Mines Company? A. Yes.

Q. What did he say and what was the conversation?

A. It was well known to all of us doing tungsten business—

Mr. THATCHER.—I move to strike that out.

Mr. WHEELER.—(Q.) Just say what he said, and what you said, if anything.

A. We discussed money matters pertaining to the sale of the market of tungsten; and I asked him, among other things, how he was getting on with his work at the Friedman mine, as it was known at that time, and he told me that the mine had not developed in accordance with his anticipations; and I remember distinctly that he told me that [547—542] the mine had developed 19,800 tons of ore, but by a stretch of imagination he could bring it up to twenty-three thousand odd tons. I don't remember the exact tonnage that he had set out to develop—a larger tonnage; "Well," I said, "Then you don't propose to go on with the deal?" He said "I do," he said, "I am going to take the mine away from the boys," or "away from Friedman," or something to that effect, and looked me right in the eye when he said it. That was about the end of our conversation.

Q. You have been, Mr. Loring, interested in a

(Testimony of W. J. Loring.)

mine situate near this property for some time, have you not? A. Yes, I have.

Q. What is the name of that mine?

A. Pacific Tungsten mine, owned by the Pacific Tungsten Mining Company.

Q. Is that an adjoining property? A. It is.

Q. And you were interested in that property all during the year of 1919, were you not?

A. Yes, sir.

Q. Had you ever seen or known of the terms of the document Exhibit "C" annexed to plaintiff's complaint, being Mr. Taylor's contract with certain stockholders of the defendant Nevada Humboldt Tungsten Mines Company, dated April 2d, 1919? A. I had never seen it.

Q. You knew nothing of the terms of that contract prior to entering into the contract of the 16th day of August, 1919? A. I did not.

Q. There was one little matter in your testimony; I asked you if you had entered into the contract of the 16th of August prior to or after receiving Mr. Goodman's telegram, dated the 19th day of August; what is the fact with regard to that?

A. Well, the dates speak for themselves, I don't remember.

Q. At any rate, the contract of the 16th was entered into on the [548—543] 16th, and your telegram from Mr. Goodman possibly did not come until after you had entered into the contract?

A. I remember distinctly when that contract was executed, but I don't remember the other date.

(Testimony of W. J. Loring.)

Q. Did the plaintiff Taylor say anything with regard to whether or not the defendant corporations, or any or either of them, were solvent or insolvent in your conversation with him in New York?

A. I don't recall any such conversation.

Mr. WHEELER.—That is all.

(By Mr. COOKE.)

Q. Did he say anything about how he was going to take the property away from the Friedman people? A. He did not.

Q. Didn't he go into that phase of it?

A. He did not.

Q. You have related the conversation as nearly as you can recall it?

A. Absolutely word for word, I believe.

Mr. COOKE.—That is all.

Mr. THATCHER.—That is all, except with reference to the matters requested. I asked the witness to produce some checks and memoranda to show the dates when the amount of \$10,000 was advanced on thirty tons of concentrates?

Mr. WHEELER.—That is all for the present, Mr. Loring. Have counsel the documents referred to in the course of the testimony of Mr. Poole, as being documents indicating Mr. Bancroft's method of computation?

Mr. THATCHER.—I think we have; that is, I don't know whether we have the documents, but we are making a search for them. Mr. Taylor recollects of having had, or known in general what Mr. Bancroft's method was, and we have been

searching through the papers. We have some more papers in my files, and we will make a further search. [549—544]

Mr. COOKE.—There is another document of some kind, used by Mr. Murrish in redrafting?

Mr. THATCHER.—We didn't have that; that went into the waste-basket that evening.

Mr. WHEELER.—Is it disputed on an occasion when there was a discussion between Mr. Taylor and Mr. Poole in Denver, there were certain documents or memoranda containing what purported to be Mr. Bancroft's method of computation?

Mr. THATCHER.—I am not even sure about that; that is what we are looking for. Mr. Taylor had been informed, either by letter or otherwise, of a method which might be used by him, informed by Mr. Bancroft of the method of computation of tonnage.

Mr. WHEELER.—It is apparent that there must have been some conversation between these gentlemen of some kind, or else it could not have been known to Mr. Taylor, or that Mr. Taylor had some letters or documents.

Mr. THATCHER.—No question about that.

Mr. WHEELER.—Can we not go further and say on some occasion, the 30th or 31st of March, or the 1st or 2d of April, when these gentlemen were together in Denver, that those documents were produced, and before them.

Mr. THATCHER.—I am not so sure about that; but that method of calculation was present, that

(Testimony of W. J. Loring.)

is what I will admit; whether there were any documents or not, I don't recollect. So far as we can ascertain, they had their offices together, and had on various occasions conversations, but whether a memorandum made by Mr. Taylor whether he carried it in his memory, or had a letter, I am not sure; we are looking through the papers.

Mr. WHEELER.—Let us see if we cannot save time this afternoon by admitting this: Will you admit there was a conversation between [550—545] them in Denver on one of those days with regard to Mr. Bancroft's method of computation, and that in some manner, either orally or through documents, that method was made known to Mr. Poole by Mr. Taylor?

Mr. THATCHER.—Yes, I think I can admit that.

Mr. WHEELER.—Then we are content to rest with that admission on the statement of our witness that the documents were there.

(At 12 o'clock a recess is taken until 1:30 P. M.)

AFTER RECESS—1:30 o'clock, P. M.

W. J. LORING, recalled for further direct examination.

Mr. WHEELER.—(Q.) Mr. Loring, you spoke this morning about a certain sum of seventeen thousand odd dollars which entered into the first payment made by you on September 1st; did that sum consist of money loaned by you to the defendant corporations, or either of them, or did it come up

(Testimony of W. J. Loring.)

in some way through the purchase of claims against some one of those corporations?

A. Purchase of claims.

Q. Examine, if you please, the two documents which I hand you, and state whether or not they are the assignments of the claims making up that item of seventeen thousand and some dollars, and upwards?

(Hands to witness.)

A. Yes, they are.

(The papers are handed to counsel for plaintiff.)

Mr. THATCHER.—No objection.

Mr. WHEELER.—We offer the two documents in evidence. One of them is an assignment from the Rochester Mines Company of a claim of \$13,-158.52, to W. J. Loring, being a claim against the Nevada [551—546] Humboldt Tungsten Mines Company.

(The assignment is marked Defendant's Exhibit "A-31.")

Mr. WHEELER.—The next is an assignment of \$4211.63, a claim for that amount against the Nevada Humboldt Tungsten Mines Company, also to W. J. Loring.

(The assignment is marked Defendants' Exhibit "A-32.")

Mr. WHEELER.—(Q.) I call your attention to your contract with the Nevada Humboldt Tungsten Mines Company, and to the following provision therein: "It is further understood and agreed that the said party of the second part shall receive

(Testimony of W. J. Loring.)

credit upon the installment of the purchase price falling due on the first day of September, 1919, for the sum of \$13,158.52, being the amount of a certain claim against the Nevada Humboldt Tungsten Mines Company assigned by Rochester Mines Company, a Nevada corporation, to the party of the second part, and also for the sum of \$4211.62, being the amount of a certain claim against the Nevada Humboldt Tungsten Mines Company, assigned by Rochester Combined Mines Company, a Nevada corporation, to the party of the second part; said claims or accounts now being the property of the party of the second part and due and owing to him." Do you recall that declaration of the contract. A. I do.

Q. What claims are there referred to?

A. The claims covered by these assignments.

Q. When you testified this morning to a claim for \$17,000 and upwards, to what had you reference?

A. To the assignment of these two claims by the Rochester companies.

A. It was not then a payment on account you had previously made, prior to the first day of September? A. No, it was not.

Q. The amounts of these two claims which belong to you were by this agreement made a part of the September 1st payment? A. That is right.
[552—547]

Q. You spoke this morning about \$10,000 which you had advanced against concentrates, I call your attention to the following provision of this con-

(Testimony of W. J. Loring.)

tract: "All payments of the installments of the purchase price above set forth shall be made in cash, or by certified check, or by cashier's check, or bank telegraph transfer, to the credit of the parties of the first part, at the First National Bank of Lovelock, Nevada, by payment thereof to its cashier, J. T. Goodin, who is trustee for the creditors of said parties of the first part, who shall first pay off the loan of \$10,000 procured to pay off labor claims, and shall thereafter pay out said installments so received to said respective creditors in accordance with his trust." State whether or not that is the ten thousand dollar item referred to by you in your testimony this morning?

A. It is.

Q. That was the \$10,000 which you had loaned against certain concentrates? A. Yes.

Q. Was it or was it not a payment on account at the time that you handed it over to the party obtaining the same?

Mr. THATCHER.—I object to that as calling for the conclusions of the witness, and leading.

Mr. WHEELER.—(Q.) Well, state the circumstances under which you advanced that money, and whether or not it was a payment on account of this contract?

A. That was a private loan to this company to pay off their labor that they were behind in, and no part of this contract at all.

Q. You took security for it?

A. I took security of thirty tons of concentrates.

(Testimony of W. J. Loring.)

Q. How were you paid the amount of that loan?

A. I had the privilege of retaining the concentrates or accepting \$10,000 out of the first payment on the first of September. [553—548]

Q. As a matter of fact, what took place on the first of September, how much money on that day was first paid in to the defendant corporations by you under your contract with them?

A. Fifty thousand dollars.

Q. Made up how?

A. Made up by these two assignments, and the balance in cash.

Q. By the two assignments you mean \$17,000?

A. \$17,000 and upwards.

Q. Then after the balance had been paid in in cash, how did you receive your \$10,000?

A. A check was passed through the bank, I believe, at Lovelock to the credit of myself.

Q. Who did it come from? A. J. T. Goodin.

Q. Was that payment of \$10,000 made pursuant to the following provision of the contract, after certain recitals to the effect that the payment was to be made to J. T. Goodin as trustee for the parties of the first part, then quoting: "Who shall first pay off the loan of \$10,000 procured to pay off labor claims"? A. That is the fact.

Q. It was paid pursuant to that provision?

A. It was.

Mr. WHEELER.—That is all.

Cross-examination.

Mr. THATCHER.—(Q.) I take it then the pur-

(Testimony of W. J. Loring.)

pose of this is to correct your testimony of this morning? A. Yes, it is.

Q. And that you were mistaken as to the details? A. Yes, I had forgotten about it.

Mr. THATCHER.—With the production of these matters it is unnecessary to produce any checks or other items called for.

Mr. WHEELER.—You don't care for them?

Mr. THATCHER.—No, we don't care for them, because this gives us the facts. [554—549]

Mr. THATCHER.—(Q.) Mr. Loring, I call your attention to a letter of date of September 25th, and ask you if you ever saw that letter before?

A. No, I haven't seen that letter before; that was signed by my office manager.

Q. It came out of your office, did it? A. Yes.

Q. One of your letter-heads? A. Yes.

Q. Do you know under whose direction it was sent?

A. My office manager takes care of them.

Q. Your office manager takes care of them?

A. Yes.

Q. Under your instructions?

A. All the matters in my office are under my instructions.

Mr. THATCHER.—We ask to have it marked for identification, if the Court please.

(Letter dated September 25, 1919, from W. J. Loring to Howland Bancroft, is marked Plaintiff's Exhibit No. 51 for identification.)

Mr. THATCHER.—That is all, Mr. Loring. [555—550]

Mr. WHEELER.—I am not certain that the suit by Mr. Taylor against the Nevada Humboldt Tungsten Mines Company for a recovery, according to its prayer, of between nine and ten thousand dollars, being the same suit that was settled for \$7,000, has been testified to here.

Mr. THATCHER.—Are you offering the record?

Mr. WHEELER.—I am offering the record.

Mr. THATCHER.—I don't like to see the record in this case so much encumbered. Can't we agree on the facts?

Mr. WHEELER.—I think that record ought to be in, and if it ever comes that either party desire merely to have its substance stated, we can arrange for that.

Mr. COOKE.—Number 2262 is the suit for the nine thousand dollars.

Mr. THATCHER.—We object as incompetent, irrelevant and immaterial to any of the issues in this case, or any defense of the defendants, or any of them.

The COURT.—Did you object to the complaint and the answer?

Mr. THATCHER.—In the damage suit?

The COURT.—No, the suit that was settled. You have introduced part of the record in that case, have you not?

Mr. WHEELER.—Not part of the record; at least I did not. 2262 is the one for \$9,000, and

2263 is the one we are depending on for the basis of our defense.

The COURT.—I thought that went in this morning without objection, to what issue is that record offered?

Mr. WHEELER.—That is upon an election; that the suit was brought, that it passed to judgment, and that it was subsequently paid with Mr. Loring's money.

The COURT.—Why can't you admit that? If that is the only thing, simply that it is offered on that issue, I don't see why you can't [556—551] admit the very language of your pleadings. This is getting to be an enormous record.

Mr. WHEELER.—I think that can be done. I would like before having it considered as foreclosing us, to look through that once more, but that I can do at another time, before argument.

Mr. THATCHER.—I am willing to admit that the suit was brought, and that judgment pursuant to stipulation—

The COURT.—You admit his allegations in the complaint?

Mr. THATCHER.—No, I don't want to admit it was paid with Mr. Loring's money, or that we knew that it was his money; that part I don't admit. I will admit the suit was brought, admit the amount was paid, but do not admit it was Mr. Loring's money, or that we knew it was Mr. Loring's money.

Mr. WHEELER.—Let me suggest this: That the suit was brought to recover a balance of \$9,000 and upwards, alleged by the plaintiff Taylor to be due to him because of advances made pursuant to Exhibit “A,” attached to plaintiff’s complaint; that the suit resulted in a settlement and judgment of dismissal for the sum of \$7,000, and that that is the suit wherein the moneys represented by the checks offered in evidence this morning were paid in the manner heretofore testified.

Mr. THATCHER.—I don’t care to stipulate to that; that is rather broad; but it was paid, and paid by the checks here identified, and in the manner stated.

Mr. WHEELER.—And the suit was one brought by Taylor against the Nevada Humboldt Tungsten Mines Company to recover a sum of \$9,000 and upwards, alleged to be a balance due for advances made under the contract Exhibit “A” annexed to plaintiff’s complaint—what is known as the ore-buying contract.

Mr. THATCHER.—That is all right.

Mr. WHEELER.—I am not sure that the entire record in B-1 is in. [557—552] The complaint is in. If not, we desire to have the entire record considered as read. We next offer in evidence a bill of sale from the Nevada Humboldt Tungsten Mines Company to W. J. Loring, dated the 23d day of August, 1919, of a certain water power contract. (Bill of sale, Nevada Humboldt Tung-

sten Mines Co. to W. J. Loring, dated August 23d, 1919, marked Defendants' Exhibit "A-33.")

Mr. THATCHER.—No objection.

Mr. COOKE.—In regard to the claim of Hugh F. Watts for \$299.70, Mr. Thatcher, is that the correct amount?

Mr. THATCHER.—I could not say; we think it is.

Mr. COOKE.—We have a statement of account rendered to the Nevada Humboldt Tungsten Mines Company, \$299.70; I suggest this stipulation to cover that: That that was paid on or about July 1, 1919, by Mr. David Taylor, and an assignment of that account taken by him.

Mr. THATCHER.—I will admit that that is the fact.

Mr. COOKE.—You haven't the assignment here with you?

Mr. THATCHER.—We have it, but I think it is over in Reno. We will admit that is the fact, and object merely to the admission or consideration of it as evidence, on the grounds that it is not within any of the issues, does not constitute any defense to the action in this case on behalf of the defendant, and incompetent, irrelevant and immaterial.

Mr. COOKE.—You are willing to include in the stipulation that that account was a claim by Watts against the Nevada Humboldt Tungsten Mines Company?

Mr. THATCHER.—Yes, I will admit that, and I will admit that it has never been paid.

The COURT.—To what issue is that?

Mr. COOKE.—In connection with the allegations of the answer that David Taylor at or about this time was engaged in an effort to get [558—553] in the accounts against the Nevada Humboldt Tungsten Mines Company in his own name, for the purpose of being used in a coercive way to aid him in accomplishing his object in getting that property on more reasonable terms.

The COURT.—I don't see the bearing of that testimony in this case. His reliance on the statements that are alleged to have been made to him in Denver at the meeting of the 2d of April could not have been influenced by that; and the offer that he made in San Francisco certainly could not have been influenced by that; and I don't see where his motives subsequent to that date cut any particular figure in this case.

Mr. COOKE.—This particular item here is along about July 1st, it is true, but there is other evidence which showed he had that same motive. We think the evidence shows he had that motive at the time he made that proposition which he claims is an offer of performance.

The COURT.—Well, you can offer that evidence first, but I think I shall sustain the objection to this; or, if you place a great deal of reliance on it, you may offer it, and it will be stricken out on motion. At any rate, with that stipulation, it

would go into the record anyway. It is an equity case, and testimony that is offered remains in the record, if there is any exception taken to its exclusion.

Mr. COOKE.—We next offer in evidence the statement, or the evidence of Mr. Terwilliger, who is connected with Ingersoll-Rand Company of San Francisco, California, one of the creditors of the Nevada Humboldt Tungsten Mines Company, to this effect—and this is under stipulation by counsel that he would so testify if he were here: That on or about the 3d day of June, 1919, at the time when the creditors of the Nevada Humboldt Tungsten Mines Company were called [559—554] into conference in relation to their claims against that concern; that Mr. Terwilliger, the witness, met Mr. David Taylor and Mr. Jackson, his attorney, at the office of Mr. Bayless, the attorney who has testified in this case, in the Crocker Building in San Francisco, and that in that conversation, in the presence of the parties named, Mr. Taylor asked Mr. Terwilliger if he, meaning the Ingersoll-Rand Company, which he represented, would sell him, Taylor, their account against the Nevada Humboldt Tungsten Mines Company, and that before Mr. Terwilliger had time to answer that question, Mr. Jackson interposed, and said, in substance and effect, “Now, David, I would not do that,” and nothing more was said or done in reference to the matter. That is offered for the same reasons and to prove the same matters as I stated

in connection with the other, that at said time he was trying to purchase these accounts.

Mr. THATCHER.—We are willing to admit that if he were here he would so testify, but we don't admit that is the truth; and we further object to the consideration of the facts of those statement, even if they be the truth, on the ground and for the reason that they do not constitute or show any defense on behalf of the defendants in this action, and incompetent, irrelevant and immaterial.

Mr. COOKE.—Well, we think in a suit of this kind the motive of the party is of the highest importance.

(Discussion.)

The COURT.—The Court cannot go behind his motives in exercising a right that was his, and if his acts did not measure up to what he should have done under those conditions, certainly the Court would not listen to him in saying that he intended to fulfill his contract, in the face of the fact that he did not. I do not think I have any right to go behind his motives, if he offers to fulfill his [560—555] contract, nor can I excuse him for a failure to fulfill his contract because his motives were of the very best, and it was a mistake on his part.

Mr. COOKE.—It is in the record to this extent, I take it, that if nothing more is presented to show it is proper, your Honor would simply strike it out and exclude it.

The COURT.—No, I think I will strike it out now; but you can argue that is an error, and ask me to change my ruling later, if you wish to do so.

Mr. COOKE.—Very well.

Mr. WHEELER.—Mr. Thatcher, in our answer we allege, and I think it is consistent with your own allegations, that at a meeting which had been called, there were a certain number of shares represented, and they were ready to vote this ratification, and would have voted the ratification but for the temporary restraining order issued by the Court.

Mr. THATCHER.—Yes, we will admit they would have taken the step.

Mr. WHEELER.—And that the number of shares would have been voted as there indicated.

Mr. THATCHER.—And the number of shares so indicated.

The COURT.—You have admitted that in your pleadings, haven't you?

Mr. WHEELER.—We make the allegation affirmatively in our answer; counsel does not make the allegation; he admits our allegation.

So far as I know, that will end our case.

Mr. COOKE.—We rest. [561—556]

**Testimony of George B. Thatcher, for Defendants
(In Rebuttal).**

Mr. GEORGE B. THATCHER, called in rebuttal as a witness on behalf of defendants:

Mr. WHEELER.—We waive the oath. I realize

(Testimony of George B. Thatcher.)

the delicacy in view of the rule of court, and will not put you in the position of testifying; your statement will be entirely agreeable to us. I trust you will accept it in that way, for I realize the embarrassment that attends the argument and presentation of a case by counsel who intends to go under oath.

Mr. THATCHER.—I do not know what the Court's position will be.

The COURT.—It is immaterial to me whether you take the oath; your statement, as far as I am concerned, has just as much weight as if made under oath.

Mr. WHEELER.—All I desire is the privilege of asking some questions.

Mr. THATCHER.—My statement is, then, that Defendants' Exhibit "Z" was prepared by me in Reno during the first week in August, I think on the 8th; it was dictated in my office, and transcribed by a stenographer in the office of Hoyt, Norcross, Thatcher, Woodburn & Henley. The interlineation "W" after "1.75%" and ahead of "03" is in my handwriting. The interlineation "Bonds" above "preferred stock" in the third line from the bottom is in my handwriting. The words "New corporation to be formed immediately, 65% stock to be placed in escrow," are all in my handwriting. This paper was presented to Mr. L. A. Friedman by me, in company with David Taylor, in the office of Judge L. N. French, on the 8th day of August, 1919.

(Testimony of George B. Thatcher.)

Mr. COOKE.—Whose handwriting is at the bottom of that?

Mr. THATCHER.—Mine, Mr. Cooke.

Mr. COOKE.—Three lines at the bottom there, I believe.

Mr. THATCHER.—The three lines at the bottom and the word “Bonds” [562—557] and the “W” are all in my handwriting.

Mr. WHEELER.—So far as the witness has gone, as far as my client is considered, we admit the fact as stated by you.

Mr. THATCHER.—Now with reference to the conversation with Mr. Friedman, I will state that I was in San Francisco for two or three days prior to Thanksgiving, 1919; that I was there on the day after Thanksgiving; that I left on Friday after Thanksgiving, 1919, and went East; that on my way East I took train number 20; that I did not stop at Reno on the way East from San Francisco, but went directly to New York; that I was in New York or Washington or on the train at all times in November and December on and after the 28th day of November; that I argued a case in the Supreme Court of the United States on the 8th day of December, and that about the 4th or 5th of December I was in New York; that I returned from the East and arrived in Reno about the 19th of December, 1919; that I heard Mr. Friedman’s testimony; that Mr. Friedman is mistaken; that I did not have that conversation with Mr. Friedman

(Testimony of George B. Thatcher.)

at that time, or to the best of my recollection at any other time. I think that is all.

Mr. WHEELER.—(Q.) Did you at any time have any conversation with Mr. Friedman, in which the matter of postponing payment of all over and above one thousand dollars under that settlement was discussed? A. With Mr. Friedman?

Q. Yes. A. No, sir.

Q. Was there never any conversation between you at all with regard to when and under what circumstances the second payment should be made?

A. I don't believe there was, Mr. Wheeler.

Q. With whom did you conduct the negotiations, Mr. Thatcher?

A. First with Mr. French—Judge French; they opened with Judge French, and they closed with Mr. L. A. Gibbons. [563—558]

Q. Did you have any conversation wherein the reason for postponing that payment was indicated to you by any person, whether Mr. Friedman or any representative of the defendant corporations, or any of them? A. I did.

Q. What was that conversation?

A. That conversation was with Mr. Gibbons; it took place on the first—about the first of February, or a day or two afterward. I asked Mr. Gibbons if I could have the check for the balance on the Taylor contract or settlement; he then said no, it will have to wait a few days until they get their next payment.

(Testimony of George B. Thatcher.)

Q. Did you understand what payment he then referred to?

A. I think I did understand that.

Q. You did surmise that it was a Loring payment, did you, Mr. Thatcher? A. I think I did.

Q. And so, apart from any question of conversation with Mr. Friedman, the real fact is, it was your best belief at that time, and you suspected that the money that was to be paid was to be paid in by Mr. Loring on account of his contract?

A. That is true at the time of that conversation.

Q. And was in February of 1920? A. Yes, sir.

Q. You had acted as the attorney for the plaintiff in filing a bill in this court in which you had alleged the insolvency of the defendant Nevada Humboldt Tungsten Mines Company, had you not?

A. I have prepared all suits that are on file against the corporation or any of the defendants.

Q. Do you recall the circumstance—I will show you the bill if there is any question in your mind about it—that you had drafted a complaint, and my recollection is that you verified it?

A. I verified the complaint in this action.

Q. In this action? A. Yes, sir. [564—559]

Q. Then I may be in error. Let me get that complaint, if you please. Just examine the bill in that case, and say whether or not you prepared it. (Hands to Mr. Thatcher.) That is case number 2263 in this court. A. Yes, I prepared it.

Q. I call your attention to the paragraphs therein

(Testimony of George B. Thatcher.)

referring to the insolvency of the defendant corporation.

A. Will you call my attention to that?

Mr. COOKE.—Paragraph 9, page 7.

Mr. WHEELER.—Refer to the last page: “That in truth and in fact said corporations and each of them are now insolvent”; and that would be as of the date of filing the complaint, I take it.

A. Yes, sir.

Q. You recall drafting that? A. I do.

Q. And it was a matter at that time within your knowledge and belief that the corporations were insolvent? A. I should not say that.

Q. At any rate you drafted that at a time when you believed the corporations were insolvent?

A. I drafted that at the time stated there.

Q. Did you believe at the time that you drafted that that the corporations were insolvent, apart from the Loring contract

A. I had made no investigation of my own accord as to the solvency or insolvency of the corporations; I had been informed as to the amount of the debts of the company; I did not know the value of their property or assets; their debts, or at least according to my information, were some place between a hundred and fifty and two hundred and twenty thousand dollars.

Q. Calling your attention further to the allegations of the complaint, the value of the assets of the corporation as therein alleged—let me say, Mr. Thatcher, that it is not in any way for [565—

(Testimony of George B. Thatcher.)

560] the purpose of contradicting you personally.

A. Not at all.

Q. Let me ask Mr. Jackson, perhaps that would be the best way to bring it about: Can it not stand here admitted without further questioning Mr. Thatcher, which I do not desire, that it was known to David Taylor at the time this payment was accepted by him, the first payment of a thousand dollars, and also the second payment, that the properties and assets, with certain minor exceptions, of the defendant Nevada Humboldt Tungsten Mines Company, had been by agreement transferred to Mr. Loring, and that the sole and only assets of the corporation were at the time that he accepted those moneys, the payments to become due under the Loring contract?

Mr. THATCHER.—Well, my understanding at that time was that there had not been—I don't know what to do, whether to go down there or stay up here—my understanding of the situation was this: it was our contention at that time that no valid contract had been entered into; that the sale of the corporate assets by the stockholders, without a meeting called in accordance with the terms of the statute, was invalid. Now it is my statement that the contract was either invalid and therefore the corporation entitled to its property, or it owned the assets of the contract with Mr. Loring.

Mr. WHEELER.—(Q.) At the time that the payments were made, however, you did know that

(Testimony of George B. Thatcher.)

the corporation had passed over the possession and control of its properties to Mr. Loring?

A. I did.

Q. And you also knew and also understood and believed at the time that you had Mr. Taylor verify that complaint that there were no other assets in the corporation which would bring money under the conditions then existing, than the Loring contract?

A. Now, let me see—give me that paper, please. (A paper is [566—561] handed to Mr. Thatcher.) My recollection of the situation is this; that when this bill of complaint at law, number 2263, was filed, the only information I had, or that Mr. Taylor had, with reference to the Loring contract was Mr. Loring's telegram, in which he said, or this is the substance of it: I have option on Nevada Humboldt, I think it is, or whatever it may be; the telegram has been offered in evidence, and is of date the 11th of August. After the receipt of that telegram I asked Judge French, I believe, to give me a copy of the proceedings of stockholders and directors which authorized that contract; I don't recollect exactly when I received that, but it was before the institution and filing of the suit, B-1.

Q. You sent this complaint on to Mr. Taylor in its present form, expecting him to verify it?

A. No, Mr. Taylor was in Reno, and my recollection is that he verified it in Reno.

(Testimony of George B. Thatcher.)

Q. At any rate, when you drafted it you expected of course, that he would verify it?

A. I drafted it, and I think it was dictated in his presence.

Q. Then at the time you accepted the payment of a thousand dollars and at the time you accepted the payment of upwards of six thousand dollars for Mr. Taylor, did you not in fact believe and expect that the money to be paid thereunder would come from moneys paid in by Mr. Loring?

A. I had no beliefs or expectations in that regard; I did know at all times, after some time in September when they furnished me records of the proceedings, all of the terms and conditions of the Loring contract and papers.

Q. But, Mr. Thatcher, I understood you a moment ago, that you had a talk with Judge Gibbons, in which mention was made of the next payment, and that you understood that was to be a payment under the Loring [567—562] contract, and that that had reference to conversation prior to the payment of the six thousand dollars?

A. That conversation took place on about the first or second, or sometime after the first of February.

Q. That was prior, however, to the six thousand dollar payment, wasn't it?

A. A day or two prior.

Q. So that in accepting the six thousand dollar payment you did really understand that the source of the money was Mr. Loring?

(Testimony of George B. Thatcher.)

A. I had no such understanding or knew what the facts were.

Q. You knew that Mr. Loring had made the contract, and its terms? A. Yes, sir.

Q. You did not know of any other source from which the defendant corporations were obtaining money, did you? A. No.

Q. Did the idea at that time never occur to you as representing Mr. Taylor, that the source of the money you were receiving was W. J. Loring?

A. Did it occur to me?

Q. Yes.

A. Oh, I would not say what my mental processes at that time were. I will say this, Mr. Wheeler, at all times I knew of the Loring contract, I don't believe I am any different from any one else, and when I obtain information it usually stays with me, but what my mental processes were at that time, I cannot say.

Q. At any rate, when Judge Gibbons, a day or two before you received the six thousand dollars, made the statement to you that he did, you understood him as indicating to you that the source of that next payment, to wit: the six thousand and odd dollars, would be money received from Mr. Loring? A. No doubt of it.

Mr. WHEELER.—That is all. [568—563]

Testimony of David Taylor, for Plaintiff (In Rebuttal).

Mr. DAVID TAYLOR, the plaintiff, called in rebuttal, testified as follows:

Mr. THATCHER.—I am a little doubtful about some of these questions, if the Court please, and I don't want to take up the time if there is a straight conflict, but there are so many conversations here, and we may make headway on it.

Q. Mr. Taylor, you were present at the meetings in San Francisco which have been testified to here?

A. I was.

Q. At any of those meetings, after Mr. Jackson made a statement as to the representations, did Mr. Murrish or Mr. Nenzel or Mr. Poole at any time get up in those meetings, and state that they didn't wish or want it understood that their silence constituted an acquiescence in any of the statements of Mr. Jackson? A. They did not.

Q. They did not in your presence at any time?

A. No, sir.

Q. Mr. Taylor, did you in New York at any time in a conversation with Mr. Poole, say that you would not advance any more money on concentrates until you had received Mr. Bancroft's report?

Mr. COOKE.—Object to that as not sur-rebuttal; the witness was interrogated in regard to that, and he stated that he did not recall any such conversation.

(Testimony of David Taylor.)

Mr. THATCHER.—Now having heard Mr. Poole's testimony, I want to know if he had that conversation?

The COURT.—I will let him answer.

(The reporter reads the question.)

A. I did not.

Mr. COOKE.—I suggest to counsel that is not the testimony of Mr. Poole—Bancroft's report and further examination of the mine, as I recall. [569—564]

Mr. THATCHER.—(Q.) In New York had you a conversation with Mr. Poole, and did you state to Mr. Poole that you would not advance any more money on concentrates until there had been an examination or a report, or a further examination or report made by Mr. Bancroft? A. I did not.

Q. Did you so state to Mr. Poole in substance and effect? A. I did not.

Q. What are concentrates, Mr. Taylor?

A. The products produced from the ores at the mill.

Q. After they have been mined? A. Yes.

Q. Mr. Taylor, did you in Denver on the 30th day of March, the 31st day of March, and the first of April or the 2d of April, at any time state to Mr. Poole, Mr. Murrish or Mr. Nenzel, or any of them, that you intended to rely on Bancroft's report, and that you didn't care what the pannings were, or reported by Mr. Morrin? A. I did not.

Q. Did you at any time in any of the meetings that you had in Denver with the defendants Poole,

(Testimony of David Taylor.)

Murrish and Nenzel, state that you intended to rely on Bancroft, and that you would not rely upon any statements made or other matters shown to you on those occasions? A. I did not.

Q. Mr. Taylor, did you in Lovelock have a conversation with Mr. Poole in which Mr. Poole said, "Taylor, I don't think you have got the money to go through with this deal, I think you are lying about it"? A. I did not.

Q. Was such statement in substance or effect, made to you by Mr. Poole at any time in Lovelock on or about the 30th of May, 1919? A. No.

Q. Or on the 31st? A. No.

Q. Or at any time that you were at Lovelock on or about that time? [570—565] A. No.

Q. Mr. Taylor, were any maps prepared by you and Mr. Poole in Denver between the 30th day of March and the 2d day of April, both inclusive, 1919, except the one which has been introduced here, offered in evidence, and is plate 5 annexed to Exhibit 15, Bancroft's report?

A. No, sir, there was not.

Q. Did Mr. Poole in Denver on the 2d day of April, or at any other time on his trip to Denver, say to you that those figures, referring to the mine map, were mere estimates which had been placed on that map by John Huntington, who was a mining engineer who had brought this map up to date, and that Huntington had got that information from Mr. Morrin, who was the superintendent, and Mr. Morrin had arrived at those values by panning at

(Testimony of David Taylor.)

the mine, and that you knew as well as he did that panning was a very unreliable way of arriving at the value of ore; did you have such a conversation?

A. I did not.

Q. Did you have such conversation at that time, or any other time on that occasion, in substance and effect? A. No, sir.

Q. Mr. Taylor, at the meeting at Denver, on the morning of the 2d day of April, did Mr. Poole call your attention to the fact that the date on the map which he had brought back there, did not enable any one to calculate tonnages of ore, that it was sufficient to calculate tonnage, but that the tonnage was not necessarily ore, and did you then say, "That does not make any difference, what I want to do is to get sufficient data to present to Mr. Bancroft to show him that there has been enough additional development work done there since the last visit to warrant going again, and I want to use that to urge him, as I have been urging him to go, and he does not want to go, and I want to use this to urge Mr. Bancroft to go there again"; did you have such a conversation?

A. I did not. [571—566]

Q. Did you have it in substance or effect, on any of those occasions? A. No.

Q. I call your attention to a telegram on a Western Union Telegraph blank—have you the original of that telegram?

Mr. COOKE.—What date is it?

Mr. THATCHER.—March 28th, addressed to Nev-

(Testimony of David Taylor.)

ada Humboldt Tungsten Mines Company, signed David Taylor.

Mr. COOKE.—We have no objection to your using that copy, if it is otherwise competent.

Mr. THATCHER.—(Q.) Did you send that telegram? A. I did.

Mr. THATCHER.—We offer it in evidence, if the Court please.

Mr. WHEELER.—A letter of substantially the same date is already in.

Mr. COOKE.—We object to this as incompetent, and not rebuttal of anything brought out by the defendants.

Mr. THATCHER.—Rebuttal of the statement he was going to urge Mr. Bancroft to go to the property, and Mr. Poole's statement that he wanted the data for the purpose of urging Bancroft again to go to the property.

The COURT.—I don't believe that is in rebuttal of anything defendants have offered, but you have a pretty big record anyway, and I guess you may just as well have it in.

(Telegram from David Taylor to Nevada Humboldt Tungsten Mines Company, dated March 28, 1919, is marked Plaintiff's Exhibit No. 52.)

Mr. WHEELER.—I think Mr. Cooke in behalf of his client made the objection that it was not in rebuttal? I understood you so, Mr. Cooke.

Mr. COOKE.—Yes.

Mr. THATCHER.—That is all.

Mr. WHEELER.—No questions. [572—567]

Testimony of John G. Jackson, for Plaintiff (In Rebuttal).

Mr. JOHN G. JACKSON, called in rebuttal, testified as follows:

Mr. THATCHER.—(Q.) Mr. Jackson, you met Mr. Taylor in Lovelock, on or about the 30th or 31st day of May, 1919?

A. I did, May 31st.

Q. Were you present at conversations between him and Mr. Poole? A. I was.

Q. Were you present at the conversations which led up to the trip to the mine? A. Yes, sir.

Q. In those conversations do you recollect whether or not at any time Mr. Poole said in substance and effect to Mr. Taylor; "Taylor, you are lying, I don't think you have the money to go through with the deal"? A. He did not say that.

Q. Was anything of that kind said at all at that time? A. Nothing of that kind was said.

Q. Mr. Jackson at any time at the meetings that you had in San Francisco did Mr. Poole or Mr. Nenzel get up in the meetings and say to you or to the meeting that they didn't wish their silence to be deemed or taken as acquiescence in your statements as to the representations that had been made? A. No, sir.

Q. Did Mr. Murrish in any of the meetings so state to you?

A. Mr. Murrish did not so state in any of the meetings.

Q. Did he at any time so state?

(Testimony of John G. Jackson.)

A. He did; he took me apart one day I think it was along about Wednesday or Thursday and stated that he did not wish to be understood as acquiescing in the statements of fact in regard to the condition of the mine that I had made to them at the meeting on Monday. That is my best recollection of what he said.

Q. Did Mr. Murrish on Friday or any other day at those meetings, say to you or to Mr. Taylor that he didn't have any changes to make [573—568] to the contract, and that he wanted the proposition to be put to the creditors wholly as Taylor's proposition?

A. I have no recollection of such a statement by Mr. Murrish.

Q. Do you know whether he did or did not?

A. I feel very sure he did not make such a statement.

Q. At any rate, you have no recollection of that?

A. None whatsoever; my recollection is quite distinct the other way.

(By direction the reporter reads the last three questions and answers.)

WITNESS.—That is by Mr. Murrish directly to me, sir.

Mr. THATCHER.—(Q.) I call your attention to Defendants' Exhibit "Z," and ask you when you first saw that?

A. I first saw Defendants' Exhibit "Z" in the courtroom yesterday.

(Testimony of John G. Jackson.)

Q. Was that paper prepared by you or used by you at any time in San Francisco at the meetings which you have testified here that you had between yourself and Mr. Taylor and Mr. Bayless and the defendants, Nenzel, Poole, Murrish and Jones?

A. It was not.

Mr. THATCHER.—That is all.

Cross-examination.

Mr. WHEELER.—(Q.) Was there any paper other than the paper just examined by you, and other than the draft of contract and the addenda thereto, used in the course of those proceedings by you?

Mr. THATCHER.—Objected to as not cross-examination.

Mr. WHEELER.—I submit it is strictly cross-examination.

The COURT.—I will allow the question.

A. I have no recollection of any paper at all, Mr. Wheeler; I would not undertake to say that I did not during the conversation make notes on a pad or a piece of paper as to the terms of the agreement; there was certainly no typewritten paper at that time. [574—569]

Q. But you are not prepared to say that there was not an additional paper upon which the figures were presented to these gentlemen and the terms set down prior to your drafting the proposed form of contract?

A. Oh, yes, I am prepared to say there was no

(Testimony of John G. Jackson.)

such paper prepared and presented to them.

Q. Was there no paper prepared or used in your dealings with them; did you not read from some paper? A. No, Mr. Wheeler.

Q. Did you not refer to some paper in the course of the negotiations? No, sir.

Q. Did you not have notes before you from which you made statements in the course of that meeting?

A. The most that I can say is that it is not unlikely, as it is a habit of mine to make notes during the conversation of matters which seem of consequence, and which were to be embodied in the contract to be drawn.

Q. You were proposing to those gentlemen rather an elaborate scheme of reorganization, a corporation with preferred stock, with numbers of shares, and with terms and conditions of advancing money, were you not? A. Yes, sir.

Q. Were you stating that out of your head, or were you stating that from some memorandum upon which you and Mr. Taylor had carefully laid down the plan?

A. It was not stated from any memorandum which Mr. Taylor and I had prepared.

Q. You had discussed with Mr. Taylor before you entered your first meeting, had you not, the terms which he was prepared to make?

A. Yes, sir.

Q. And you had some memorandum setting forth those terms, which you presented to those gentlemen, did you not? A. No, sir.

(Testimony of John G. Jackson.)

Mr. THATCHER.—Object as not cross-examination, if the Court please. [575—570]

The COURT.—I will allow the question.

Mr. WHEELER.—(Q.) Did you then recite the capitalization, the amount to be advanced, the terms upon which it would be advanced, from your memory and not from some memorandum that you then had?

A. It was entirely from memory, Mr. Wheeler, or else developed during the course of the conference, and then put down, as I say, possibly on a piece of paper at that time.

Q. I understood you a moment ago that it was your habit to make notes, and to speak therefrom?

A. No, not to speak therefrom.

Q. And you thought it was quite possible that on that occasion you had such notes before you?

A. No, I think you misapprehended me, or else I did not express myself clearly, Mr. Wheeler. I said it was my habit to make notes during a conference of that kind concerning the points that were agreed upon as the conference progressed; and I very likely had such a paper before me at that time.

Q. Then as from your head you brought forward the terms which you were proposing on behalf of your client going into the organization of the corporation, its capitalization, its stock, its preferred stock, the loans that were to be made, the method of securing them, did you not set those items down upon some paper?

A. As I say, I have no particular recollection of

(Testimony of John G. Jackson.)

that, but I would not want to say now that I did not make notes during the conferences as I went along.

Q. It would be in accordance with your habit to do it, would it not?

A. Quite so; that would be in my own handwriting of course.

Q. And in order that you might have before you a recollection of the precise terms that you had proposed? A. Yes, sir. [576—571]

Q. Is it not also possible that on the occasion you showed to Mr. Murrish, or discussed with Mr. Murrish, the terms upon which you proposed to draw up the contract, and showed him, or discussed with him, with your paper before you, those terms?

A. It is possible.

Q. Examine the exhibit in question, Exhibit "Z," and state whether or not there is anything in that document that differs materially or substantially from the suggestions that were made at that first meeting, which you say probably were jotted down by you, and which may have been exhibited on that occasion after being so jotted down, to Mr. Murrish?

A. I think I used the word "possibly," Mr. Wheeler, not "probably."

Q. "Possibly," I stand corrected. (Witness examines Exhibit "Z.")

A. Yes, there are some very material differences in this paper. Shall I point them out?

(Testimony of John G. Jackson.)

Q. I think perhaps it would be well enough for you to do it, yes.

A. In the first paragraph this paper states that the estimated debt of the company is from one hundred and thirty to one hundred and forty thousand dollars, exclusive of that owed to Mr. Taylor. In San Francisco we were figuring on \$150,000, or upwards, certainly not less than \$145,000. Here is a provision that Mr. Taylor will advance \$37,500 for each 10,000 tons of additional ore blocked out from new developments. That was not discussed in San Francisco. There is a provision here that new ore blocked out under this contract shall be determined from time to time by the report of Howland Bancroft, mining engineer; no such provision as that was discussed in San Francisco.

Q. I notice in the contract as drafted by you there was a provision that Mr. Bancroft was to be the consulting engineer?

A. I think it was Mr. Thane; I have not looked at it recently, [577—572] but that is my recollection.

Mr. WHEELER.—Look at that, and see which is right, Mr. Cooke; I may be wrong.

WITNESS.—Also a provision in this paper that Mr. Taylor when all the debts of the corporation are paid shall receive 65 per cent of the stock of the corporation to be organized; the instrument in San Francisco was predicated on Mr. Taylor receiving 62 per cent and 38 per cent remaining with the former stockholders.

(Testimony of John G. Jackson.)

Mr. COOKE.—The only thing I find here, Mr. Wheeler, is B. L. Thane, managing director in charge of operations.

WITNESS.—Is that sufficient?

Mr. WHEELER.—Yes, I think so. No mention of Mr. Bancroft's name?

Mr. COOKE.—No mention of Mr. Bancroft.

Mr. WHEELER.—I stand corrected. (Q.) Now with reference to the document Exhibit "Z"; while there are the differences you pointed out, the fact is that none of these terms were ever embodied into the proposed agreement that you made in San Francisco, were they?

A. None of those terms?

Q. Yes. A. In that agreement?

Q. Yes.

A. Well, Mr. Wheeler, I have not read that agreement for over a year; my recollection is that that agreement drawn in San Francisco provided for an issuance of bonds, of which Mr. Taylor was to buy \$85,000 worth at ninety-five; those bonds were to be secured by a lien on the ore blocked out, as certified by Mr. Bancroft's report.

Q. You are now talking—

A. (Intg.) Of the San Francisco agreement, which is in evidence.

Q. There is, then, a reference to Mr. Bancroft in that agreement.

A. No, I am just trying to describe the security; I don't think [578—573] Mr. Bancroft is men-

(Testimony of John G. Jackson.)

tioned by name in the agreement; that is easily susceptible of verification.

Q. Without going into that, there seems to be a difference between Mr. Murrish, yourself and Mr. Thatcher as to one document that was used in San Francisco, and Mr. Murrish has given his recollection. I call your attention to the fact that in this document which Mr. Murrish has told us he believes was used in San Francisco, the following appears: "Mr. Taylor will advance \$85,000, \$75,000 to be paid to the creditors *pro rata*, and \$10,000 to be used as working capital for the development of the mine." That was mentioned in your first negotiation in San Francisco with Mr. Murrish?

A. Yes, sir.

Q. So there is that similarity. Was this provision not also there: "The \$85,000 is to be paid back to Mr. Taylor from ore already in sight and developed in the mine, to be mined and milled at such time as Mr. Taylor may deem best"; was not that discussed in the San Francisco negotiations?

A. Something along those lines. The discussion in San Francisco was different, and the agreement drawn in San Francisco was different from that, according to my recollection.

Q. At any rate, there are points of resemblance and points of difference?

A. Certainly, but there is no possible foundation between the two papers.

Q. You expected that Mr. Murrish might draft

(Testimony of John G. Jackson.)

this contract in San Francisco, didn't you?

A. I hoped he would before I was given the work of doing it.

Q. After a discussion of the terms proposed by you, you made the suggestion that Mr. Murrish should draft the document, didn't you?

A. That is my recollection, yes, sir.

Q. Now you didn't make that suggestion to Mr. Murrish without [579—574] having some memorandum from which he could draft and elaborate a document of the character required by such a proposal as you had made, did you? A. Yes.

Q. That he would draft it out of his head without reference to any memorandum.

A. No, sir, it was immediately settled that Mr. Murrish would not do it.

Q. You are not sure, at any rate, that you did not with Mr. Murrish go over a memorandum of your own, setting down Mr Taylor's proposed terms?

A. Yes, sir, I am sure I didn't.

Mr. WHEELER.—That is all.

By Mr. COOKE.—(Q.) Do you know what happened the memorandum that you used at that time, Mr. Jackson?

A. My recollection is quite distinct, Mr. Cooke, that immediately after this meeting, or rather the next day after this meeting, which was, if I recollect correctly, Thursday afternoon—I didn't work Thursday night—Friday morning I started to work on this contract, and I wrote it all in long hand, first prepared a skeleton, and any memorandum

(Testimony of John G. Jackson.)

that I might have had, if I did have any, and I have no recollection of having any, would be taken by me as a working paper for the preparation of the contract, and I would not have left it, naturally, with anyone else.

Q. Then you don't know where it is now; if you did have one you don't know what became of it?

A. No, I don't know what became of it, it would be a pencil memorandum only, it would not be type-written.

Q. Do you remember whether the memorandum was on yellow or on white paper?

A. No, I have no recollection of making a memorandum.

Q. You are not sure, as a matter of fact, whether you made any at all. A. No, I don't think I did.
[580—575]

Q. When you retired to formulate a draft in lead pencil, do you remember whether you had any data of any kind from which you formulated the paper which was afterwards typed?

A. Yes, I had a certain amount of data that I had gathered together in Lovelock, and other information which I had gathered in the course of conversations.

Q. What I had reference to was data which you gathered at this meeting, any notes jotted down which assisted you in making this copy?

A. No, my recollection is I had no such memoranda, and made none; I had a habit of doing it,

(Testimony of John G. Jackson.)

and that is the reason I, unfortunately perhaps, said I might have done it.

Q. Do you know where the lead pencil draft is which was afterwards copied and typed?

A. That was destroyed; that was given to the hotel stenographer to copy from, compared, and destroyed.

Q. Were there any changes made from the lead pencil copy to the typewritten copy by the hotel stenographer, or was it copied just as you handed it in the lead pencil notes?

A. Oh, I think it was copied exactly.

Q. You didn't use it in dictating, just handed it to her and she copied it?

A. That is it; she copied it, as I recollect, directly from my long hand copy of the contract.

Mr. COOKE.—No further questions.

Mr. WHEELER.—(Q.) You stated on your direct examination that you did not hear Mr. Poole say to Mr. Taylor at Lovelock, anything in substance or effect, that he, Taylor, had lied, and that he, Poole, did not believe that he, Taylor, had the money with which to complete his contract. Did you ever hear that statement made to Mr. Taylor by Mr. Poole at any other time or place?

A. No, sir.

Q. Or any part of it? A. No, sir.

Mr. WHEELER.—That is all.

Mr. THATCHER.—That is all. [581—576]

(A short recess is taken at this time.)

Mr. THATCHER.—If the Court please, I would like to offer in evidence and have the Court consider all of the stipulations extending time in case B-1, David Taylor vs. Nevada Humboldt Tungsten Mines Company and W. J. Loring; also all stipulations extending time in case 2263 at law, entitled David Taylor vs. C. W. Poole, et al.

Mr. WHEELER.—Objected to as irrelevant, immaterial and incompetent as far as the defendant Loring is concerned.

Mr. THATCHER.—It is offered particularly for the purpose of rebutting the defense, or proposed defense, of laches in prosecuting our various suits.

Mr. COOKE.—I think the exhibit offered by us, the complaint more particularly we offered, and our case on that, would go to laches, down to the time of commencing the suit, not to the prosecution of it afterwards. I have no serious objection to the stipulations, but if they are to go in, it seems to me it would be only fair for counsel to admit at the same time, the extraordinary conditions that existed at that time with reference to Mr. Gibbons' illness, and inability to handle the case, and that he was the attorney in charge of the case, and that was the reason for its being deferred by these various stipulations; that it was no disposition on the part of the defendants to postpone the case; it was due to this condition that I have mentioned, that Mr. Gibbons had charge

of the case for the firm of Gibbons, French & Stoddard, but owing to his continued illness, which finally resulted fatally, these stipulations were consented to by counsel for the plaintiff, I think most of them at the request of Mr. Gibbons' firm.

Mr. THATCHER.—That is true; Mr. Gibbons was sick, and I extended the time for him; the firm was Gibbons, French & Stoddard; they stated to me Mr. Gibbons was ill and had not been able to take [582—577] care of these matters, and I extended the time. The record will also show, however, that I extended the time for Mr. Davis or Mr. Loring, at their request, to answer in one of the suits—B-1.

The COURT.—Why not stipulate, instead of introducing those?

Mr. THATCHER.—I would rather stipulate, and prepare a statement and it can be incorporated in the record as to what the stipulations were.

Mr. WHEELER.—So far as the defendant Loring is concerned, our objection would be deeper than that. In the present action, the one we are trying, the bill was filed on the 7th day of April, 1920, and the period from the execution of Mr. Loring's contract and the time that the knowledge of that contract was brought home to the plaintiff, as appears by these notices of a meeting held on the 26th day of August, 1919, from that time forward to the time of the filing of this bill would be the period which would designate the laches

on which we rely; and stipulation that might have been entered into in an action at law would cut no figure as a defense to a suit where laches are claimed, or in mitigation of, or as a defense to laches, where it appears that the particular bill in question was not filed until April of the present year.

Mr. COOKE.—There are two stipulations in this particular case extending the time. I think the defendants all promptly answered in this case now on trial.

Mr. WHEELER.—The filing of the bill again would be the important thing.

The COURT.—I don't really see the materiality of that testimony. The stipulations were not filed until after the commencement of the suit.

Mr. COOKE.—We are not complaining about the action at law; the laches we are depending on is the delay in commencing this particular case on trial. The stipulation in the action at law [583—578] and the time allowed there, would have no bearing here; the point of our objection being that it is irrelevant and incompetent. If the stipulations had been had in this case it might be different.

Mr. WHEELER.—It made no difference in this case, the date of the filing of the bill is the important thing here.

Mr. THATCHER.—I won't encumber the record. May it be understood that the stipulations were entered into at the request of the defendant or de-

fendants in these cases, extending the time to answer up to the times when the respective answers were filed, and that these stipulations were made and given at the request of the defendants?

Mr. COOKE.—What case are you talking about, Mr. Thatcher?

Mr. THATCHER.—B-1 and 2263.

Mr. COOKE.—So far as the defendants represented by myself are concerned, I will take counsel's word for it that these stipulations were obtained as he states at the suggestion of Mr. Gibbons, who then had charge of the case; but we specifically object to the admissibility of these stipulations as having any bearing on the question of laches pleaded as a defense in this action, because they pertain to an entirely different action, which is brought in here simply by the pleadings incorporated as a part of the exhibits in this case; any laches that may have existed in the other case is in no wise material here. I cannot possibly see what relevancy laches in some other case might have, or something tending to show there was no laches in some other case, would have with reference to laches in this case.

(Discussion.)

The COURT.—I think you are entitled to put that evidence in the record, not as to what occurred since this suit was brought, but what occurred prior to the beginning of this suit, as showing that you were trying to do something. [584—579]

Mr. THATCHER.—Proceeding with some rea-

sonable degree of diligence, and asserting our various rights.

The COURT.—Well, I will let you put that in.

Mr. WHEELER.—Then I would like to offer in that connection, and ask counsel to admit the fact, that no steps whatever were taken against the defendant W. J. Loring, and the defendant Nevada Humboldt Tungsten Mines Company—that is a suit to cancel and annul the deed and contract, no service was made or attempted, and no order of publication obtained on Mr. Loring, Mr. Loring's appearance was a voluntary one.

Mr. THATCHER.—I would like to have the record show Mr. Loring's appearance was not a voluntary one, that this Court made an order.

Mr. WHEELER.—I am mistaken as to the number, the number is the present case; in the present case our appearance was voluntary.

Mr. THATCHER.—I cannot agree with you on that. I made no point that you answered when you did, or how you answered; I think in the present case as to when the answer was filed is immaterial.

Mr. DAVIS.—In the present case we were never served with process, or ordered to appear; and on the order to show cause we appeared specially by permission of the Court.

Mr. WHEELER.—That is a matter that is immaterial; however, unless your Honor has ruled, I think our objection should be stated. On behalf of Mr. Loring, we object to these stipulations on the ground they are incompetent, irrelevant and im-

material, that they are in cases other than this present action, in which the plea of laches is put forward; and stipulations in other actions than an action for specific performance to obtain this stock, is directly incompetent, irrelevant and immaterial to any issue in the case as between plaintiff and the defendant Loring.

The COURT.—Well, go on with your testimony. [585—580]

Mr. THATCHER.—I offer in evidence Exhibit 51 for identification. That is a letter from Mr. Loring's office to Mr. Bancroft, a declaration against interest.

Mr. WHEELER.—To what issue is it addressed?

Mr. THATCHER.—Addressed to the issue in which he states he had all of the assets of the Nevada Humboldt Tungsten Mines Company.

Mr. WHEELER.—Objected to as incompetent, irrelevant and immaterial, and would not prove or tend to prove that circumstance. The assets that were purchased appear from the bill of sale and the deeds already in evidence.

The COURT.—This letter was written, was it not, subsequent to the execution of the option in August, the 16th of August?

Mr. THATCHER.—Yes.

The COURT.—And this letter is written September 25th. I don't see the relevancy.

Mr. THATCHER.—My idea is it is the interpretation placed by defendant Loring upon the purchase that he made at that time, and his view that

he had purchased all of the assets of the Nevada Humboldt Tungsten Mines Company, and there seems to be some dispute as to whether he did or not.

The COURT.—I think in the present state of the record I cannot conclude otherwise than that the bill of sale, and the deed that was executed are correct.

Mr. COOKE.—On behalf of the other defendants we object to it as hearsay, and not binding upon us.

The COURT.—I think I will exclude this. I don't see where it will do you any particular good, Mr. Thatcher.

Mr. THATCHER.—That is all, if the Court please.

Mr. WHEELER.—We are waiting for a paper from Mr. Goodin.

Mr. THATCHER.—It can be stipulated that the paper Mr. Goodin [586—581] sends will be received in evidence as if he were here and identified it; it may go in, and if it should be that I desire to make inquiry with reference to it, I shall so notify counsel.

Mr. WHEELER.—I was going to suggest instead of waiting for the paper, we stipulate that of the money paid in by Mr. Loring, a certain proportion was used to pay the debts of each of the defendant corporations.

Mr. THATCHER.—I don't think there is any question about it. Just give me the exact facts.

Mr. WHEELER.—The precise amount paid on

the debts of each I think will not be of assistance to the Court in any way; it was used to pay the debts of the three different corporations; I can't see any possible advantage to either of us in showing the precise amount, so long as we know all of the debts of each of the corporations were paid.

The COURT.—How about the record in those suits?

Mr. THATCHER.—The record in what suits?

The COURT.—That there was so much discussion about a while ago. I told you I would admit all of the record showing the delays prior to the commencement of this suit.

Mr. THATCHER.—That is what I would like. They are here, I designated them.

The COURT.—I think they were not offered; I don't so understand it.

Mr. THATCHER.—I thought I had.

The COURT.—Of course that testimony is admitted for what it is worth. If Mr. Loring had not served at that time, that is perhaps another matter, but on the question of laches, it seems to me they have a right to show what they were doing prior to the commencement of this suit, but nothing subsequent.

Mr. WHEELER.—My point would be unless they were doing something [587—582] toward getting this 62 per cent of stock, it could have no possible bearing upon any defense they might make to the charge of laches.

The COURT.—Well, I don't intend to decide

that now. There are a good many things to be discussed when the question of laches is raised.

(Discussion.)

Mr. THATCHER.—I offer in evidence all stipulations, and ask counsel to consider that they have been read, extending time for the defendants to plead or answer in case number 2263 in this court.

Mr. COOKE.—With the understanding we had a moment ago, I am willing to stipulate in so far as the stipulations we are parties to; I refer to the matter of the illness of Mr. Gibbons, and the reasons that moved the defendants to ask for these stipulations.

The COURT.—I don't really see where these are going to help you very much; it is what you did that would show whether you were guilty of laches or not; the fact that you granted them delays in the trial of that suit, don't show either that you were guilty or not guilty of laches.

Mr. COOKE.—We don't make any point that they are guilty of laches so far as that case is concerned.

The COURT.—Everything you did prior to the commencement of this suit, which indicates that you were waiting to see what the result would be at the mine before you brought the suit, would have quite a bearing, as I look at the matter now.

Mr. THATCHER.—Well, I will call Mr. Loring to the witness-stand. [588—583]

Testimony of W. J. Loring, for Plaintiff.

Mr. W. J. LORING, called for further examination, testified as follows:

Mr. THATCHER.—(Q.) Since you entered into the contract—

Mr. COOKE.—Is he now testifying as your witness, Mr. Thatcher?

Mr THATCHER.—Yes, he is my witness.

Q. Since you entered into the contract of August 16, 1919, under which you entered possession of the mines and property of the Nevada Humboldt Tungsten Mines Company, has the property been operated by you?

Mr. WHEELER.—Objected to as immaterial, irrelevant and incompetent, and not rebuttal.

Mr. THATCHER.—I merely want to show by this witness that the mines have never been operated since the date he made the contract.

Mr. COOKE.—What is that rebuttal of?

Mr. THATCHER.—The question of laches.

The COURT.—I will allow the question.

A. We have kept the water out of the mine, and kept a watchman on it; we have done no mining.

Mr. THATCHER.—That is all.

Mr. WHEELER.—(Q.) That is, from the date upon which the contract of the 16th day of August was made, is it? A. Yes.

Mr. WHEELER.—That is all. [589—584]

Testimony of B. H. Morrin, for Plaintiff.

Mr. B. H. MORRIN, called as a witness by plaintiff, after being sworn, testified as follows:

Mr. THATCHER.—(Q.) Mr. Morrin, do you know when the Nevada Humboldt Tungsten Mines Company ceased operating its property?

Mr. WHEELER.—Same objection, incompetent, irrelevant and immaterial, not rebuttal.

The COURT.—Same ruling.

A. I think it was along about the 16th of August, if I remember right; I don't remember the exact date.

Mr. COOKE.—You mean 1919, I suppose?

A. Yes.

Mr. THATCHER.—That is all.

Mr. THATCHER.—I don't know what bearing the stipulations will have when we come to the argument; I want to offer all of the stipulations extending their time in cases B-1 and number 2263. Should it appear upon the argument of the case upon the merits that they are proper to be considered by your Honor, and should I be able to convince your Honor in reply to their defense that they should properly be considered, they can be considered, otherwise they can be stricken from the record.

The COURT.—They may be marked as having been offered.

Mr. THATCHER.—Stipulations extending time to appear and answer; no other stipulations are offered. We rest, if the Court please. [590—585]